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90-1873

NO. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

J. GORDON BINGHAM, ET AL.;

AND

FIRST CENTRAL CREDIT UNION,
J. GORDON BINGHAM, ET AL.,

PETITIONERS,

V.

NATIONAL CREDIT UNION ADMINISTRATION BOARD,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Albert H. Boyd
424 North McNeil
Memphis TN 38112-5134
(901) 272-3998

Attorney and Counsel of Record
for Petitioners

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QUESTIONS PRESENTED FOR REVIEW

Simultaneously, the National Credit Union Administration Board (NCUAB), an agency of the United States, filed two cases against Petitioners, including the federally-insured, state-chartered First Central Credit Union of Memphis, Tennessee. The first case was a Consolidated Notice of Charges and Hearing--Temporary Cease and Desist Order. The second case was an Order of Conservatorship. A Petition to Show Cause in each case was filed against NCUAB in the U.S. District Court in Memphis. The principal questions are:

1. Whether the Court of Appeals erred by sustaining the dismissal and mootness of the Consolidated Notice of Charges and Hearing--Temporary Cease and Desist Order?

2. Whether the Court of Appeals erred by sustaining the Order of Conservatorship?

3. Whether the Petitioners' rights to due process of law under the Fifth and Fourteenth Amendments to the Federal Constitution were violated?

PARTIES TO THE PROCEEDINGS

This petition involves two cases which were consolidated in the Court of Appeals for the Sixth Circuit by that Court's own motion. The style is the same as used in the opinion of the Court of Appeals; all parties below are parties here. Petitioners are J. Gordon Bingham, Jr., his wife, Brenda H. Bingham, managers of the First Central Credit Union of Memphis TN (Credit Union), who did business as First Central Data Services, First Central Financial Services and Employee Insurance Consultants; the Credit Union also is a petitioner.

Respondent is the National Credit Union Administration Board (NCUA or NCUAB), Washington, D.C., an agency of the United States.

No parent or subsidiary companies are required to be listed under Rule 29.1. The petitioners filed a Disclosure of Corporate Affiliations and Financial Interest in the Court of Appeals.

Petitioners were represented in the

United States District Court at Memphis as well as in the Court of Appeals by their present attorney, Albert H. Boyd.

Respondent was represented in the District Court by Mrs. Mary Rupp, Staff Attorney, NCUA, Washington, D.C., and Mr. Joe Dycus, Assistant U.S. Attorney, Memphis. Mrs. Rupp was on NCUA's brief in the Court of Appeals but oral argument was made there by Mr. John K. Ianno, Staff Attorney, NCUA, Washington.

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REFERENCE TO REPORTS OF OPINIONS BY OTHER COURTS

The opinion of the Court of Appeals for the Sixth Circuit is being published; a copy is included in the separate Appendix.

JURISDICTIONAL GROUNDS

The date of entry of the judgment sought to be reviewed is March 6, 1991. The jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1254.

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STATEMENT OF THE CASE

Notice of Filing of Notice of Dismissal of Temporary Cease and Desist Order and Notice of Charges and Hearing. Just before 5 p.m., January 16, 1990, the day before the scheduled hearing in District Court, NCUAB's attorney filed this Notice of Dismissal in the District Court pursuant to 12 U.S.C. Sections 1786-(e)(2) and (f)(1). The dismissal was unilateral:

> The Board has determined that based on present conditions, the Cease and Desist Orders are no longer necessary.

At the start of the hearing at 5:15 p.m., January 17, 1990, NCUAB's attorney told the district judge that this Notice of Dismissal had been filed January 16; that Petitioners' attorney had been notified January 16; that the dismissal mooted the case; it would no longer be before the court. The district judge had already received his copy of the

Notice of Dismissal, but the Certificate of Service therein shows Petitioners' attorney was served a copy of the Notice of Dismissal via first-class mail January 16.

The district judge made no ruling on the question of the dismissal and mootness during the hearing, although he did overrule an objection by NCUAB's attorney, on the grounds of the dismissal, to a question of Petitioners' attorney, and the judge then determined that the dismissal was not the result of an agreement as he had assumed, but was dismissed unilaterally. Neither did the district judge at the end of the hearing give any instructions about preparing an order for the dismissed case. As part of his ruling, he made the following concluding comments about the conservatorship:

> That's the court's judgment. And, Mrs. Rupp and Mr. Dycus, I'm going to ask you to prepare an order for the court to enter and the court will sign it. And we should do it soon. And if Mr. Boyd desires to perfect an appeal, it ought to be filed as quickly as possible.

However, NCUA's attorney, Mr. Dycus, did

prepare an order for the dismissed case which Petitioners' attorney declined to sign because of certain statements therein and which the district judge signed after the hearing January 31, 1990.

The Court of Appeals found the case to be dismissed unilaterally; that although petitioners did not consent to NCUA's dismissal, petitioners' counsel conceded in response to the district judges's questioning at the hearing that the effect of the dismissal was to render the action moot; that petitioners had requested the temporary cease and desist order be dismissed:

> Thus, when the NCUA dismissed the temporary cease and desist order prior to the hearing, the petition became moot because petitioners received the relief they requested.

Although further details and argument will be made later, the Court can follow the above statements better if the Court understands now that NCUA's attorney gave notice of the proposed dismissal to petitioners' attorney January 16 via telephone; that when the

Petitioners' attorney was questioned by the district judge the attorney had not received service of the notice of dismissal through the mail.

NCUAB's Response to Petitions to Show Cause. At 5 p.m., January 11, 1990, NCUAB's attorney filed in the District Court its joint response to the petitions to show cause; restated therein the allegations of the Order of Conservatorship; included a statement that conservatorship action had been taken by NCUAB in thirty-one previous cases although the scope of judicial review had been interpreted by U.S. district courts in only three cases, and in each case the standard of review was whether NCUA's actions were arbitrary and capricious; and that as to the Consolidated Notice of Charges and Hearing--Temporary Cease and Desist Order, its Response was that "NCUAB's Exercise of Its Statutory Authority to Issue a Temporary Cease and Desist Order was not Arbitrary and Capricious."

Notice of Filing of Portions of Adminis-

trative Record. At 5 p.m., January 11, 1990, at the same time of filing the preceding Response, NCUAB's attorney also filed in the District Court portions of the administrative record containing 194 unnumbered pages. This record contained a copy of the Order of Conservatorship; it did not contain a copy of the Consolidated Notice of Charges and Hearing--Temporary Cease and Desist Order; the facing page of the record however showed that it was being filed jointly in both cases.

During the hearing on the conservatorship, essentially the same record, consisting of 164 numbered pages, in which the title page and certain photocopied court opinions were deleted, was introduced into evidence as Exhibit 1 by NCUA.

Approval of Conservatorship by State. Part of the above administrative record and Joint Appendix was a letter of November 27, 1989 in which the commissioner of the state interposed no objections to the placement into conservatorship of the Credit Union by NCUA,

the authority being Title XII, Section 1217 of the Financial Institutions Reform, Recovery and Enforcement Act, signed into law August 9, 1989.

Four contracts had been entered into by the Board of Directors of the Credit Union with Mr. Bingham, said the commissioner; the contracts favored Mr. Bingham; he had refused to renegotiate the contracts. Because of the contracts, and the inability of management, the Credit Union was experiencing profitability problems. It was in a deficit position. The Commissioner further said:

> It is my understanding that upon the appointment of a conservator by NCUA, the conservator may seek to repudiate any contract with (sic) is deemed to be burdensome to the institution. It is further my understanding that NCUA's long-term goal is to merge the Credit Union into another credit union in the Memphis, Tennessee, area.

Consolidated Notice of Charges and Hearing--Temporary Cease and Desist Order. On December 15, 1989, representatives of NCUA served a Consolidated Notice of Charges and Hearing--Temporary Cease and Desist Order,

Docket No. 891202-III, on J. Gordon Bingham, Jr., the manager with his wife Brenda H. Bingham of the state-chartered First Central Credit Union of Memphis (Credit Union). This notice and order was served pursuant to 12 U.S.C. Sections 1786(e)(1) and (f)(1).

Sec. 1786(e)(1) provides that the NCUA Board (NCUAB) may serve upon a credit union a notice of charges if the credit union is about to engage in an unsafe or unsound practice or violate any written agreement entered into with NCUAB. The notice is to contain a statement of the violation or the unsafe or unsound practice and fix a time and place at which a hearing is to be held to determine the issuance of any order to cease and desist.

Sec. 1786(f)(1) provides that a temporary cease and desist order may issue pending the completion of the administrative proceedings and NCUAB's dismissal of the charges, the order being effective upon service on the credit union.

The notice and order notified Petitioners

of the hearing to be conducted in accordance with the Federal Credit Union Act, 12 U.S.C. Sec. 1751 et seq, and NCUA's Rules and Regulations, 12 C.F.R. Part 747.01 et seq. Ten references in fact are made in the nine-page Notice and Order to a "hearing," and two references to the "proceedings," at a time and place to be set, for which timely notice would be given. Petitioners were directed also to file an answer with NCUA within twenty days of the service of the Notice and Order. Petitioners' attorney was directed to file a Notice of Appearance with NCUAB. The record shows that an answer and Notice of Appearance were filed. Petitioners also could apply within ten days as provided in 12 U.S.C. 1786(f)(2) for an injunction setting aside or limiting the Order pending the completion of the administrative proceedings.

Petitioners did apply for review and the case was set for hearing January 5, 1990. NCUA obtained a continuance until January 17. January 16, the sixteenth, at 4:30 p.m., a

Notice of Filing of Notice of Dismissal of Temporary Cease and Desist Order and Notice of Charges and Hearing was filed in the clerk's office of the District Court, the Certificate of Service showing service on the Petitioners' attorney herein via first-class mail also on January 16, one day before the hearing. The authority given by the Regional Director for the dismissal was 12 U.S.C. Sections 1786-(e)(2) and (f)(1).

Sec. 1786(e)(2) says that a cease-and-desist order becomes effective thirty days after service of an order except a cease-and-desist order issued upon consent; however, NCUAB's pleading itself shows that the temporary cease-and-desist order was effective immediately upon service, and was not issued upon consent.

Sec. 1786(f)(1) provides for a hearing; it says that the order served upon the credit union is to remain effective pending the completion of the administrative proceedings, and until such time as the Administration

dismisses the charges (emphasis added).

Petitioners were ordered to immediately cease and desist from interfering with the conservatorship or aiding or abetting any unsafe or unsound activity of the Credit Union, or entering its premises without written permission. They were immediately ordered to continue to provide adequate space for the Credit Union, continue to provide data-processing, and provide any other requested information. The temporary order was necessary because Petitioners were about to engage in an unsafe or unsound practice and violate provisions of the Federal Credit Union Act, 12 U.S.C. Sections 1551 et seq.

Under Charges, NCUAB was concerned particularly about the safety and soundness of the data processing services if the Petitioners should discontinue this service. Since the building housing the Credit Union was owned by Gordon and Brenda Bingham they could attempt to deny access to the building, enter it without permission, as well as destroy

books and records.

Under Facts, the Credit Union's Board of Directors had been advised in June 1987 by NCUA's Regional Director not to enter into contracts with the Binghams without his express approval, including that of the state, since the Regional Director would consider that to be an unsafe and unsound act resulting in administrative action. Four contracts were entered into in December 1988 by the Board of Directors with the companies owned by the Binghams: for the management of the Credit Union; for marketing of insurance to the membership; for data-processing services; for the leasing of real and personal property.

These contracts contributed to high operating expenses, large operating losses and the erosion of equity. These contracts provided material benefit to Petitioners, the Binghams, at the expense of the Credit Union and its members, and the insurance fund was put in jeopardy. Since the Binghams had virtual control over every area of the

operation they would likely put their own interest ahead of the Credit Union by engaging in unsafe and unsound practices.

Failure of the Petitioners to comply with the provisions of the temporary or any final order of NCUAB could result in civil money penalties of up to One Millions Dollars ($1,000,000) a day.

Order of Conservatorship. At the same time NCUAB served the preceeding notice and order, which was effective immediately, it also appointed itself conservator, also effective immediately, under authority of 12 U.S.C. Sec. 1786(h)(1), the sole, single authority cited in the whole Order. It said that with approval of the state NCUAB could appoint itself conservator ex parte without notice and immediately take possession and control of an insured credit union to conserve assets or to protect the insurance fund or the members.

NCUAB determined that, because of the Credit Union's unsafe and unsound practices,

the Order of Conservatorship was necessary to conserve assets and to protect the insurance fund and the members. The Court should note well here, however, as will be argued later, that, according to 12 U.S.C. Sections 1786(e)(1) and (f)(1), unsafe and unsound practices are statutory grounds for a notice of charges, a hearing, and a temporary cease and desist order, and such unsafe and unsound practices were averred as shown above in the dismissed companion case.

The Credit Union was chartered by the State of Tennessee October 25, 1977. NCUA first became involved when an insurance review was conducted March 31, 1984. Since that time NCUA had been heavily involved in the on-site supervision. The most recent insurance review was completed April 14, 1989 and culminated in the issuance of a Letter of Understanding and Agreement of July 27, 1989. Several on-site follow-up supervision contacts since that time had been made to monitor the Credit Union's progress. The Credit Union

as of October 31, 1989 had problems of:

Excessive loan losses; profitability caused in part by the new contracts; capital erosion; unsafe and unsound contracts entered into without the express approval of the Regional Director and the state since the Regional Director considered that to be an unsafe and unsound act which would result in administrative action; and failure to comply with a Letter of Understanding and Agreement signed July 27, 1989.

In an Order of Nonpublication for protection of assets, the insurance fund and members, NCUAB ordered that the Order of Conservatorship not be disclosed or made public except as authorized by the Conservator.

Testimony

Ben Mauldin, with NCUA for twelve years in civil service, held a bachelor's degree in accounting, and was former Director of Special Action in Atlanta. On December 15, 1989, he served the Order of Conservatorship and the

Consolidated Notice of Charges and Hearing--Temporary Cease and Desist Order on J. Gordon Bingham, Jr. The case had been assigned to special action in February 1989 after the signing of the four contracts. As a result of the contracts, he participated in an insurance review; the contracts were discussed extensively. As a result, a Letter of Understanding and Agreement was signed by the parties in July 1989, in which NCUA agreed the Credit Union would have until May 31, 1990 and May 30, 1990 to comply with provisions as to capital and earnings respectively.

Originally, the Board of Directors of the Credit Union refused to sign the Agreement; but they had an option--they were told to either sign or NCUA would have to consider administrative action. In August 1989 a meeting was called to discuss the contracts. No loss and no run on the Credit Union had been experienced. He classified the Credit Union as a good credit union; it had problems in the last ten to twelve months. It had never had to

have assistance in making a declaration of dividends. This was the first action against the Credit Union. He had been involved in two conservatorships.

The management and insurance contracts were canceled verbally by NCUAB also December 15, 1989. He knew at that time that ten days were allowed to seek court review, but there was no indication whether Mr. Bingham or the other officials were going to file within ten days or not, but the contracts were terminated at the time of delivery of the orders. He had authority to cancel the contracts under the conservatorship, and that authority was based on discussions with general counsel and other attorneys in Washington, as well as present counsel, Mrs. Rupp.

James Richardson had been with NCUA for twenty-five years and was a principal examiner; he held a bachelor's degree in business administration with emphasis in accounting and was in civil service; he had been in Memphis thirteen years. He first

began performing insurance reviews of the Credit Union in April 1984, and had concerns at that time because technically the Credit Union was insolvent. Gordon Bingham, president of the Credit Union, testified that when the conservator for the Credit Union was appointed, it was solvent.

Mr. Richardson said a financial statement of the Credit Union reflected a net loss of $273,536.23 from January through October 31, 1989. But Mr. Bingham testified that a lot of the Credit Union's loss for the year was caused by NCUA's changing the rules. The state had reserve rules that the Credit Union went by for years, then under the Letter of Understanding and Agreement executed in July 1989 the Credit Union had to use another rule and charge off a lot more money than had been charged off in past years. The Board of Directors were refusing to sign the Agreement because it was incorrect in many places; compliance dates of May 31, 1990 and May 30, 1990, were not given the NCUAB when approval of the conservatorship

was sought and the Board had additional time to comply.

Mrs. Bingham, vice-president, did the accounting for the Credit Union. She said NCUA made them sign the Letter of Understanding and Agreement. Since 1981 the Credit Union had used state figures on delinquncy and the amount of money that had to be kept in reserve, but under the agreement the state procedure was no longer adequate, and NCUA wanted the Credit Union to use an arbitrary figure which their examiners would use in determining which loans were bad. NCUA determined which loans were delinquent and whether they were losses. The Credit Union was made to charge off one loan of $10,000, and the next day it was paid off. In October [1989] Mr. Richardson said to raise the allowance for loan losses by $161,000; there was some 70, 80,000 in it then, but the Credit Union had to raise that by $161,000. The difference had to be expensed in October, and then NCUA said the Credit Union had a

tremendous loss in October. The state did not have an allowance for loan losses; it is against state law. Mrs. Bingham had to make two reports every month, one for the state, the regulator of the Credit Union, that did not have an allowance for loan losses, and one for NCUA that did have an allowance for loan losses. According to Mrs. Bingham, NCUA was actually regulating the Credit Union.

Mr. Richardson told the Binghams that they could not accept deposits above $2,000--he did not tell them that--it was an agreement. The Binghams agreed to it. It was in the record as an agreement; any mandate would have to come from the regional office; he was doing it under his discretionary authority; he made the decision himself--along with the Board of Directors. This was 1985. According to the witness the Credit Union was advertising an 11 per cent rate on any account over $2,000. A lot of people were putting heavy chunks of money into the Credit Union; the amounts averaged something like $35,000; the Credit

Union was earning slightly less than 8 per cent on their investments and they were paying 11 per cent on these chunks of money. During closing argument Petitioners' attorney was informed by the Court that Mr. Bingham wanted to say something, which he related to his attorney, but the Court said no proof was in the record as to the Credit Union's average yield.

Mr. Richardson said the Credit Union was a life-line credit union, one serving a membership that would not have credit union service elsewhere, companies that did not have the number of people to have their own credit union; the Credit Union was life-line in that respect. Mr. Bingham testified that the Credit Union had about seven hundred participating companies--including the Better Business Bureau of Memphis. Mr. Richardson was not aware of any obligation of any member to have insurance marketed by the Binghams; it was not required because that was a condition of the state that any insurance premiums and so

forth not be required; as far as he knew nothing was required to be purchased. Mr. Bingham confirmed that no member had to take insurance; no complaint had been received from the state department of insurance or anybody; less than 20 per cent of their membership had insurance, even though some companies joined the Credit Union just to get the group dental and health insurance.

Mr. Bingham testified that he sold over $100,000,000 of life insurance prior to getting into the Credit Union, that he and his wife had been very successful in the insurance business and they found this to be way of sponsoring a credit union. He and his wife first became involved with the Credit Union as managers at the end of 1978. At first they had no contract and were just donating space, then they invested in a computer because one or two employees could not keep up with the bookkeeping. At the present time it had about seven hundred participating companies---including the Better Business Bureau of

Memphis.

Mr. Richardson testified that he had been offering suggestions for the improvement of the Credit Union since 1984 and he considered it in a lot better shape than it was in 1984; especially at the end of 1987 and 1988 it had grown financially stronger. The Binghams were managers of the Credit Union during his association with it; the assets and the memberships had grown. The NCUA had not approved the percentage-of-gross-income contract for the Binghams as managers, but the original contract of 29.5 per cent had been approved by the state. He accepted the 40 per cent contract, but the Binghams were never told that they had to rescind the 40 per cent contract. Robert Wilson, testifying for the Credit Union, however, said that the Binghams had worked as a management team under a percentage contract until December 1988 when the Board was instructed by NCUA to come up with other contracts for them to work under and which were put into effect January 1989.

According to Mr. Richardson the difficulty with the Credit Union started when the Binghams changed from the percentage contract to a definite-sum contract as managers with the Credit Union then having to absorb all the other operating expenses; that change occurred January 1 [1989].

Mr. Bingham testified that the first percentage contract was approved by the state and he also was approved to be on the Board. Mr. Richardson required them however to get proof that they would have money to subsidize the 40 per cent contract and continue to sponsor the Credit Union. Mr. Bingham obtained such proof in letter form from one of his insurance companies that guaranteed him $30,000 a month for six months, and Mr. Richardson therefore allowed them to continue to operate the Credit Union.

Mr. Mauldin testified that the Credit Union had problems in the last ten to twelve months; he classified it as a good credit union. Mr. Richardson testified that the

Credit Union had a high propensity for loan losses because of the people they served; a CPA firm several years before had determined that the Binghams had contribduted $614,000 in support of the Credit Union. Mr. Bingham confirmed by an exhibit that a CPA firm, Zoccola & Associates, reported by letter of November 24, 1986 that the Binghams had put $614,916 into the Credit Union.

In marketing the Credit Union, Mr. Richardson said that Mr. Bingham had worked for a long time toward merging a credit union with Malone & Hyde in Texas with the Credit Union. Mr. Richardson did not recommend that the Malone & Hyde Credit Union be given to another credit union; he recommended putting off the approval. Texas had approved the merger; Tennessee had approved the merger; NCUA did not approve the merger.

As for the lease contract, Mr. Bingham testified that Mr. Richardson would not let the Credit Union buy the building that housed the Credit Union so the Binghams bought it for

$175,000 for the use of the Credit Union which leased 60 per cent of it. The Credit Union had to have a place and this building was a former branch bank.

In providing data processing services under that contract, Mr. Bingham said that the Credit Union had gone through three different Unisys computers and he and his son had learned to use all of it. When NCUA took over, they crashed the computer--and could not get it back up; they could not get the printer to work, and Mr. Bingham showed them how to operate it at three o'clock in the morning. His son had been discharged originally by NCUA, then brought back to help them with the computer. Later, NCUAB had another computer in place at the Credit Union, although his Unisys computer was under a maintenance contract of $1,300 a month.

NCUAB stated in its temporary order that the failure to comply with its terms, or any final order issued by NCUAB pursuant to the proceedings, could result in civil money

penalties of up to $1,000,000 per day. In the Order of Conservatorship, an Order of Nonpublication provided that its contents must not be disclosed or otherwise made public except to the extent authorized by the conservator or his agents. Mr. Bingham testified that NCUAB was referring telephone calls about insurance to him, but he could not help because of the possible fine. He further related that John S. Ruffin, Regional Director of NCUA, Atlanta, said that he was going to move the Credit Union within ten days, and apparently had already made plans to move until his attorney objected to the move at the time NCUA's attorney sought a continuance of the hearing. As the source of his statement Mr. Bingham identified an article, which was admitted as an exhibit, that appeared in the Memphis Business Journal of January 1-5, 1990. The hearing was set for January 17, 1990.

Ginger Andrews testified she had served on the Board of the Credit Union for four or five years. She was employed by Federal

Express, in Memphis, as a CPA, in corporate accounting, and spent a year in the legal department, reviewing contracts. Presently she was a senior account research analyst and analyzed the revenues and receivables and did internal account studies. The Credit Union served blue collar workers, low income people; Federal Express served people with much higher income. She had been a part of the negotiations between the Board and the Binghams. Before the Board went into the matter of the contracts, the Board wanted an audit done to see exactly how much the Binghams had spent of their own money on the Credit Union. Zoccola & Associates, a reputable CPA firm, reported [November 24, 1986] that the Binghams had contributed $614,981 to the Credit Union.

Mr. Mauldin of NCUA testified that NCUA is "mandated by Congress to regulate, not regulate, but to supervise and direct the share insurance fund"; the main purpose was to protect the insurance fund, which was over a billion dollars. Mr. Richardson of NCUA was

very much interestsed in preserving the insurance fund; as to how much money was in that insurance fund, he had no idea. Mr. Bingham testified that according to annual reports he received, the insurance fund was closer to two billion dollars.

Robert Wilson did business as the United Auto Recovery, Memphis, and had been a member of the Board of the Credit Union since its inception in 1977. However, he was told by Mr. Richardson and NCUA's attorney from Washington, Mrs. Rupp, that he had a conflict of interest. He had a car repossession agency and did work for 90 per cent of the credit unions and had done so since 1973, and did the same for First Central Credit Union. He was told that it would be best if he resigned, which in did in May or June 1989. Mrs. Rupp quoted something from an NCUA or federal guideline or manual where it was said that if what he was doing could be conceived as a conflict of interest that he needed to either give up what he was doing or resign his

position from the Board of Directors.

Dr. James Collier served on the Board of the Credit Union probably since 1977 or 1978. He was chairman of the Board and familiar with the four contracts. Dr. Collier did not willingly sign the Letter of Understanding and Agreement. The state commmissioner indicated that this was in the nature of an order. The agreement was signed because they were ordered to do it. Mr. Bingham testified that Dr. Collier had taken all ten parts of the written national examinations to qualify as a Certified Credit Union Executive, the first person to be so certified in West Tennessee. Mr. Bingham had taken one, and Mrs. Bingham, two, of the tests. Dr. Collier said he held a bachelor's degree in chemistry, a master's degree in insurance, and a Ph.D in insurance and finance. He was retired from Memphis State University where he taught mostly finance and insurance. Gordon Bingham had a degree in finance from Memphis State University, he and his wife Brenda held the distinction

of Chartered Life Underwriter, and he was formerly the Director of Insurance for Memphis and Shelby County, Tennessee.

Mr. Bingham testified that Mrs. Andrews, a Board member, worked in the legal department of Federal Express and reviewed contracts and leases for them, which is what she was doing when the contracts herein were negotiated. NCUA strongly asked that the Board have legal counsel to draw the contracts, an expense the Credit Union could not afford; therefore the Binghams ended up paying over $10,000 in disputed attorneys' fees for the contracts. The management contract for him and his wife was for $48,000, for two people.

ARGUMENT

The questions involved in this petition are of national importance; they should be finally decided by this Court; they appear to be of first impression. The opinion of the Court of Appeals is not clear in that it omits relevant details as to all that happened, and if allowed to stand certain significant

questions of statutory interpretation, case law and constitutional application will be left unanswered to the detriment of the world of credit unions. The published opinion of the Court of Appeals therefore will have little value as a precedent except to allow NCUAB's agents to continue their transgressions.

Dismissal and Mootness

1. NCUAB's unilateral dismissal did not render this case moot. NCUAB made use of two contradictory pleadings and orders simultaneously, and the Court needs to understand this matter as a whole to see the duplicity, improper procedure and lack of due process. At the time of the district judge's questioning, Petitioners' attorney also informed the judge that "there is some cross-referencing in the two cases." NCUAB was relying upon the same allegations applicable by statute only to the dismissed case to prove the necessity for the conservatorship. The dismissal did not moot the issues of the four contracts and the

Letter of Understanding and Agreement because the same issues as to Unsafe and Unsound Contracts and the Failure to Comply with the Letter of Understanding and Agreement, the basis for these cases, were also pleaded and still at issue and very much alive in the companion conservatorship case. As said by the Court of Appeals in citing its own case, **International Union v. Dana Corp.**, 697 F.2d 718 (6th Cir. 1983, en banc), the litigation as a whole had not concluded.

At the beginning of the hearing January 17, 1990 in District Court NCUAB's attorney said that the day before with notice to Petitioners' attorney he had filed a notice of dismissal which mooted this case. The district judge said he had received his copy, which would have been hand delivered, by the time of the hearing; however, Petitioners' attorney argues by inference that the above notice of January 16 was via telephone, that he had not received his mailed copy of the notice by the time of the hearing and resultant

questioning--with time to prepare, to study all the statutory provisions--which the judge should have realized. Moreover, the customary way to dismiss under these conditions was by application of Rule 41 of the Rules of Civil Procedure which required the filing of a stipulation of dismissal. The judge however never made a ruling of any kind during the hearing.

Sometime after NCUAB's attorney made the above announcement as to dismissal and mootness, the district judge asked whether Petitioner's attorney confirmed the mootness, and still later erroneously assumed that the dismissal was the result of an agreement, then overruled NCUAB's objection to a question on the grounds of the dismissal. Although the Court of Appeals concluded that petitioners did not consent to NCUA's dismissal their counsel did concede in response to the district judge's questioning that the effect of the dismissal was to render the case moot, since Petitioners had received the relief they

requested; but no authority is cited for such holding. The dismissal however highlighted the abusive charges and irresponsible methods used by NCUAB, in Atlanta, against Petitioners, law abiding American citizens who invested over a million dollars in sponsoring the Credit Union, all of which was beneficial to the members and known by Mr. Richardson, in Memphis. Not one member of the Credit Union testified for NCUAB.

Moreover, this Court should note that NCUAB's own pleadings indicated that the scope of review for the hearing of the dismissed case to be the broad provisions of the Administrative Procedure Act, 5 U.S.C. Sec. 706, whereas the Court of Appeals affirmed inconsistently that the scope of review for the conservatorship was only whether NCUAB acted arbitrarily and capriciously, but independently of the Administrative Procedure Act. NCUAB's filing of both cases simultaneously, apparently their modus operandi, would have required the district judge to apply a different scope of

review for each case while hearing them simultaneously. How can such procedure be constitutional due process? As shown in **International** a cease and desist order should be used first; it then is followed by a conservatorship. What is the purpose in this case of filing both at the same time, except to take advantage of the Temporary Cease and Decease Order. From the record NCUAB never intended to hold a hearing in the case dismissed although as shown below a hearing is required by statute either before or after issuance of an order to cease and desist. Filing both at the same time is an abuse of legal process. Before this Court the whole matter apparently is one of first impression.

To support the dismissal the Court of Appeals cited **International** wherein the parties had executed a Settlement Agreement which mooted the case. This is the very point argued below by Petitioners in the Court of Appeals. The usual way of dismissing a case set for hearing after issues joined is for the

attorneys on either side to sign a consent order of dismissal for submittal to the court; and in fact such stipulation is required by Civil Rule 41. What Petitioners' attorney said in response to the district judge's questioning was not the proximate cause of the dismissal; it was the administrative, unilateral decision by NCUAB to dismiss and approved by the Court of Appeals. The district judge in this case never expressed an opinion during the hearing; the resultant order should have been based upon a ruling made in open court; and the order finally entered still was not based upon any findings under 5 U.S.C. Sec. 706 as set forth in NCUAB's own pleadings and as required by that statute, as shown next.

2. The scope of review applied in the District Court and approved by the Court of Appeals was not that applicable according to statutory guidelines. As said in NCUAB's consolidated notice and order the forthcoming hearing would be be conducted in accordance with the Federal Credit Union Act and Part 747

of NCUA's Rules and Regulations, 12 C.F.R. 747.01 et seq. Sec. 747.01 provides that judicial enforcement of an order, as well as judicial review thereof, shall be as prescribed in the credit union act and what is commonly called the Administrative Procedure Act, 5 U.S.C. Sec. 500 et seq. The scope of review of a reviewing court is set forth in 5 U.S.C. Sec. 706; as said in the heading:

> ... the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action....

The Court of Appeals failed to require such scope of review.

3. The Court of Appeals further erred by overlooking the statutory grounds upon which NCUAB's notice of dismissal was based. The statutes relied upon were 12 U.S. Sections 1786(e)(2) and (f)(1). Sec. 1786(e)(2) has nothing to do with this case. The cease-and desist order was effective immediately upon service rather than becoming effective at the expiration of thirty days; neither was the

order issued by consent as provided in 1786(e)(2); and very importantly any such order is issued based upon the provision of 1786 (e)(1) which, as shown in the next paragraph, provides for a hearing.

Sec. 1786(f)(1) involves the unusual procedure necessary in issuing a temporary cease and desist order prior to a hearing--although a hearing is still required after its issuance to determine if the order should be permanent. The difference is that Sec. 1786(e)(2), cited in the above paragraph, is based upon the procedure outlined in 1786-(e)(1), which provides for a hearing or an opportunity for a hearing before the issuance of a cease and desist order. Either way, a hearing must be held, before or after the issuance of the order. Such hearing has been denied Petitioners.

NCUAB also in unilaterally dismissing the charges misconstrued 12 U.S.C. Sec. 1786(f)(1) by using "and" disjunctively rather than conjunctively. This section toward its end may

be paraphrased as follows:

Such order shall remain effective and enforceable (1) pending the completion of the administrative proceedings pursuant to such notice--**and**--(2) until such time as the Administration shall dismiss the charges specified in such notice.

As said in Black's Law Dictionary "and" is used to conjoin clauses; it signifies that something is to follow; it means "along with." This section therefore as condensed in (1) and (2) above required a hearing before the dismissal. The statute does not provide that NCUAB may alternatively hold a hearing--**or**--dismiss the charges. Petitioners have been denied a hearing.

4. Therefore, and for all of which, the Court of Appeals erred in approving the withholding of a hearing, the withholding not being in accordance with law, and denied Petitioners their life, liberty and property contrary to the Fifth and Fourteenth Amendments to the Federal Constitution, and in

violation of the scope of review provided in 5 U.S.C. 706(1),(2)(A) and (2)(B).

Conservatorship

1. The Court of Appeals erred in sustaining the conservatorship because in effecting the appointment NCUAB arbitrarily and capriciously misappropriated statutory language applicable only to the imposition of a cease and desist order. The only section of the code cited in the Order of Conservatorship is 12 U.S.C. 1786(h)(1), the authority for the conservatorship herein under subparagraph (A) because of the allegations of necessity to conserve the Credit Union's assets, the insurance Fund and interests of the members. However, 1786(h)(1) including subparagraph (A) contain no expression of statutory powers. But in support of the Order of Conservatorship NCUAB arrogated unto itself the provisions of 1786(e)(1), without specifying the section, which is the authority for the imposition of a cease and desist order by NCUAB for engaging in an unsafe or unsound practice or the violation

of a written agreement entered into with NCUAB, as in the case dismissed.

For example, Section IV of the Order of Conservatorship was devoted to Unsafe and Unsound Contracts, which allegedly were unreasonable and profited Mr. Bingham to the detriment of the Credit Union, contributed to the losses experienced by the Credit Union, and were burdensome and materially threatened the insurance fund; and Section V was about the Failure to Comply with the comprehensive Letter of Understanding and Agreement, in which Petitioners had agreed to certain provisions which ostensibly would alleviate the above problems, although Petitioners were forced to sign the Agreement under threat of administrative action by Mr. Mauldin, NCUA's Director of Special Action in Atlanta.

This case therefore is really about the four contracts, including the comprehensive Agreement, all of which were very prominent in the pleadings of both cases herein. The prophesied statutory insolvency in twelve

months was questionable as a grounds for conservatorship because the Credit Union was insolvent in 1984 when no conservator was appointed. The authority for the conservatorship was found in Title 12, Sec. 1217 of the Financial Institutions Reform, Recovery and Enforcement (FIRRE) Act of August 9, 1989, according to the commissioner of the state in his letter of November 27, 1989, wherein he also said that the Board of Directors had entered into four contracts with Mr. Bingham which favored his interests and were a detriment to the Credit Union, that a conservator could seek to repudiate any contract deemed to be burdensome to the Credit Union, and his further understanding was that NCUA's long-term goal was to merge the Credit Union. Yet, no statutory authority to repudiate any contract deemed to be burdensome was specifically cited in the Order of Conservatorship served December 15, 1989.

The emphasis placed upon the contracts is shown also by the fact that in February 1989,

right after the four contracts were signed, the case was assigned to NCUAB's Ben Mauldin in Atlanta. Mr. Richardson in Memphis also was very much concerned about the contracts, since they were incurred by the Credit Union as of January 1, 1989. As a result of the contracts, an insurance review was conducted in May 1989, at which time the contracts were discussed extensively; as a result the comprehensive Agreement was issued. In August 1989 further negotiations took place about the contracts. Therefore, the chief theme and substance of these two cases is the four contracts and the Agreement which purported to be a formal joint recognition of the Credit Union's situation

In sustaining the conservatorship the Court of Appeals relied upon decisions affecting the former Federal Home Loan Bank Board (FHLBB): **Alliance Federal Savings and Loan v. FHLBB,** 782 F.2d 490, (5th Cir. 1986), and **Biscayne Fed. S. & L. v. FHLBB,** 720 F.2d 1499 (11th Cir. 1983), cert. den. 467 U.S. 1215

(1984). First, the Court of Appeals was unaware that because of a major overall of the banking industry in view of its many problems, FHLBB and the position of Chairman of FHLBB, were abolished by Sec. 401(a)(2) of the above FIRRE Act of August 9, 1989 (U.S. Code and Congressional News, Vol. 1, 101st Cong., 1st Sess. 1989, 103 Stat. 354).

The enabling statute in the above two cases was 12 U.S.C. 1464(d)(6)(A) which authorized FHLBB to appoint a conservator because of unsafe or unsound practices or unsafe or unsound conditions to transact business, whereas those unsafe or unsound practices or conditions are not grounds for a conservatorship under NCUAB; but under 12 U.S.C. 1786(e)(1) they are grounds only for the issuance of a cease and desist order, as in the case dismissed.

However, the Court of Appeals was unaware that such statutory grounds differed for FHLBB and NCUAB. Congress saw fit to make further distinctions between FHLBB and Credit Unions.

In 1464(d)(6)(A) thirty days were allowed to seek court review against FHLBB; ten days are allowed against NCUAB. Petitioners attorney could well have used the thirty days herein in view of the tenth day's being Christmas Day, followed by New Year's, when law libraries were closed during much of the holiday season or on short hours and no time existed to file motions or take discovery; when the members of the Board of Directors were out of town or difficult to find, and by inference in view of their cross-examinations, they only appeared at time of trial to testify for Petitioners--and all of them did testify for Petitioners. Also, a stay was provided against FHLBB; none against NCUAB.

Moreover, in **Biscayne**, the parties had stipulated to statutory insolvency. A stipulation means an order voluntarily signed by all parties, whereas in the case at bar Petitioners were forced to sign the Agreement under threat of administrative action. The Agreement was hardly that since it was

coerced. In **Biscayne** outrageous conduct by FHLBB's staff following their appointment had not contributed to the insolvency, whereas in this case the regulation of this state-chartered Credit Union by NCUAB contributed to the conservatorship, such as for example NCUAB's changing of state rules to require an allowance for loan losses when the state law did not provide for an such allowance, and the Credit Union's resultant technical loss as of October 31, 1989. This amounts to federal preemption of state regulation, and, except for the appointment of a conservator, no provision exists in the federal and state credit union acts for delegation of authority.

Finally, NCUAB's real purpose in these two cases was to eliminate the Credit Union's management and its outstanding and independent Board of Directors because of the four contracts, and not some technical insolvency inasmuch as the Credit Union was insolvent in 1984, a basis of estoppel. The District Court

assumed that NCUAB possessed powers to exercise as conservator which assumption was approved by the Court of Appeals. However, for the first time as its power to cancel contracts, NCUAB cited 12 U.S.C. 1787(c)(1)-(A)(B)(C) in its brief before the Court of Appeals, even though this section was a part of the FIRRE Act and also effective August 9, 1989. The District should have been made aware of this information. Petitioners should have been informed originally of all relevant statutes in NCUAB's pleadings in making their decision to seek court review; this information for the first time in the Court of Appeals comes too late. Constitutional due process requires notice and an opportunity to prepare.

Furthermore, NCUAB's imposition of the Order of Conservatorship at the same time as the Consolidated Notice of Charges and Hearing--Temporary Cease and Desist Order is contradictory. Under the all-inclusive theory of the Court of Appeals as to the conservatorship, that is all that would be

necessary. NCUAB however arrogated unto itself the cease and desist provisions, which is also outside the record of meaning of the statute, without providing the hearing. Petitioners appealed both cases to show the modus operandi and the lack of a fair hearing in the whole matter. NCUAB has national jurisdiction and the questions raised herein are important and of a recurring nature.

WHEREFORE, Petitioners earnestly pray that this petition be granted.

Respectfully submitted,

Albert H. Boyd
424 North McNeil
Memphis, Tennessee 38112-5134

Attorney for Petitioners

CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Petition for Writ of Certiorari have been served upon Mrs. Mary Rupp, Staff Attorney, National Credit Union Administration, 1776 G Street, N.W. Washington, D.C. 20456, that three copies also have been served upon the Solicitor General, Department of Justice, Washington, D.C. 20530, all via U.S. Mail, first-class postage prepaid, this 4th day of June 1991.

Albert H. Boyd

Albert H. Boyd

Attorney for Petitioners

(3)

Supreme Court, U.S.
FILED
JUN 4 1991
OFFICE OF THE CLERK

90-1873

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

J. GORDON BINGHAM, ET AL.;

AND

FIRST CENTRAL CREDIT UNION,
J. GORDON BINGHAM, ET AL.,

PETITIONERS,

V.

NATIONAL CREDIT UNION ADMINISTRATION BOARD,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Albert H. Boyd
424 North McNeil
Memphis TN 38112-5134
(901) 272-3998

Attorney and Counsel of Record
for Petitioners

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RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 90-5401/5402

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

J. GORDON BINGHAM, et al. (90-5401); and FIRST CENTRAL CREDIT UNION, J. GORDON BINGHAM, et al. (90-5402),
Plaintiffs-Appellants,

v.

NATIONAL CREDIT UNION ADMINISTRATION BOARD,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Western District of Tennessee

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Decided and Filed March 6, 1991

Before: MILBURN and GUY, Circuit Judges; and BROWN, Senior Circuit Judge.

MILBURN, Circuit Judge. Plaintiffs-appellants ("petitioners") in these consolidated cases appeal the dismissal of their petitions to show cause challenging the issuance of a temporary cease and desist order and the imposition of a conservatorship by the National Credit Union Administration Board. For the reasons that follow, we affirm.

I.

First Central Credit Union of Memphis, Tennessee (the "credit union") was chartered by the State of Tennessee and insured under the National Credit Union Share Insurance Fund, administered by the National Credit Union Administration ("NCUA"). The NCUA oversees credit unions in a similar manner as the FSLIC and the FHLBB oversee savings and loan associations.

In April 1984, the NCUA was contacted by the State of Tennessee to conduct a joint insurance review of the credit union. The insurance review was conducted by James Richardson, principal examiner for the NCUA in Memphis, Tennessee, and it revealed that the credit union was technically insolvent because the share ratio was approximately 99.5%, indicating that the shares were worth less than a dollar for a dollar.

In February 1989, Richardson conducted another insurance review of the credit union. This review revealed that the credit union was operating at a net loss of approximately $50,000 for the first two months of 1989. The credit union's loss was caused in part by delinquent loans and collection problems. Richardson testified that the NCUA's main concern was the future profitability of the credit union. Specifically, Richardson was concerned that the operating expenses of the credit union would increase due to four contracts it had entered into in January 1989 with J. Gordon and Brenda Bingham and companies owned by the Binghams. Bingham was the president of the credit union and the treasurer of the board of directors, and his wife was the vice-president of the credit union.

The four contracts were for management of the credit union, data processing services, insurance marketing, and a lease of the credit union building. The management contract paid the Binghams $48,000 per year for seven years. The data processing contract gave First Central Data Services, a company owned by the Binghams, the

right to provide data processing services to the credit union for seven years for a fee of approximately $13,000 per month. The insurance marketing agreement gave Employee Insurance Consultants, another company owned by the Binghams, the sole right to market insurance to credit union members and to provide payroll deductions through the credit union for insurance premiums over a seven-year period. The Binghams owned the building in which the credit union was located, and under the lease agreement the Binghams received $6,000 per month from the credit union to rent 60% of the building space. J. Gordon Bingham purchased the building in 1986 for $175,000, and under the lease he received $72,000 per year for fifteen years.

By June 1989 the credit union's operating expense to gross income ratio was 75.5%, compared to a peer group average of 34.9%. Also, by June of 1989 the credit union's losses on loans were six times that of its peer group. In July 1989, a Letter of Understanding and Agreement was entered into by the credit union, the State of Tennessee and the NCUA. James Richardson testified that the purpose of the agreement was to cause the credit union's board of directors to take the actions necessary to correct deficiencies in the operation of the credit union.

At a meeting in August 1989, the credit union's board of directors presented a proposed budget to the NCUA showing a loss of $99,000 over the next twelve months. The NCUA found this budget to be unacceptable because it indicated that the credit union would be insolvent within one year. The NCUA gave the credit union officials thirty days to present a revised budget showing that the credit union could become profitable. The credit union officials prepared a revised budget, and James Richardson testified that he reviewed the budget and determined that it was unrealistic because it was based on projections not supported by the facts. Richardson testified that the credit union projected income increasing at 1% per month with loans increasing at the same rate, but the credit union's history over the past several months revealed that loans

were decreasing at a rate of 18 to 20% per month. The budget also projected an increase in shares of 16 or 17% per annum, but the credit union's growth rate for the past three to four years had been 5 to 6%.

On October 31, 1989, the credit union submitted a statement of financial condition to the NCUA which revealed that the credit union had lost $273,563.23 from January through October 1989. Based upon these losses and the credit union's inability to submit a realistic budget, Richardson recommended that the NCUA place the credit union into conservatorship to conserve its assets. Ben Mauldin, NCUA's region III Director of Special Actions, concurred with Richardson's recommendation based on the rapidly deteriorating financial condition of the credit union. Mauldin testified that the credit union's capital had declined rapidly over the preceding ten months, and the credit union was operating at a substantial loss

On December 14, 1989, the NCUA Board moved to place the credit union into conservatorship. On December 15, 1989, NCUA officials served an order of conservatorship and a consolidated notice of charges and hearing and temporary cease and desist order on J. Gordon Bingham at the credit union. The order of conservatorship notified the credit union's officials and board of directors that the NCUA was appointing itself conservator of the credit union pursuant to 12 U.S.C. § 1786(h)(1) in order to conserve the assets of the credit union, to protect the share insurance fund, and to protect the interests of the credit union members. The order of conservatorship identified excessive loan losses, profitability, capital erosion, unsafe and unsound contracts, and failure to comply with the letter of understanding and agreement as problems at the credit union which necessitated imposing the conservatorship.

The temporary cease and desist order directed J. Gordon Bingham, Brenda Bingham, and their companies, First Central Data Services, First Central Financial

Services, and Employee Insurance Consultants, not to interfere with the NCUA's exercise of its duties as conservator of the credit union. The Binghams were ordered to immediately cease and desist from entering the credit union premises without the written permission of the NCUA. The Binghams and their companies were also ordered to continue to provide adequate space for the credit union under the lease agreement and to provide data processing services under the data processing contract. The order notified the Binghams that a hearing would be held to determine whether a permanent cease and desist order should be issued.

On December 26, 1989, J. Gordon Bingham filed a petition to show cause in the district court challenging the order of conservatorship.[1] On the same date, Bingham, his wife, and their three companies filed a petition to show cause challenging the consolidated notice of charges and hearing and temporary cease and desist order. A hearing was scheduled for January 5, 1990, but it was continued to January 17, 1990, at the request of the NCUA. On January 16, 1990, the NCUA filed in the district court a notice of filing of notice of dismissal of temporary cease and desist order and notice of charges and hearing, stating that the temporary cease and desist order had been dismissed by the NCUA.

At the hearing on January 17, 1990, the NCUA asserted that its notice of dismissal mooted the petition challenging the temporary cease and desist order. Counsel for petitioners conceded in response to questioning by the district judge that the case was moot with regard to the temporary cease and desist order. Accordingly, no evidence was presented on that issue at the hearing, and the district court did not rule on the merits of the petition challenging the temporary cease and desist order. On January 31, 1990, the district court entered an order

[1]On January 31, 1990, the district court granted Bingham's motion to amend the complaint to add First Central Credit Union as a plaintiff.

dismissing the challenge to the temporary cease and desist order holding that it was moot.

Following a two-day evidentiary hearing on the challenge to the conservatorship on January 17-18, 1990, the district court held that the NCUA's decision to place the credit union into conservatorship was not arbitrary and capricious. The district court stated that the record indicated the NCUA had ample reason under the federal statute to impose the conservatorship. On January 31, 1990, the district court entered an order dismissing the challenge to the conservatorship. The Binghams and their companies timely filed the present appeals, and this court consolidated these appeals.

The principal issues on appeal are: (1) whether the district court erred by dismissing the petition challenging the temporary cease and desist order as moot, and (2) whether the district court erred by dismissing the petition challenging the conservatorship.

II.

A. Temporary Cease and Desist Order

Petitioners argue that the NCUA's unilateral dismissal of the temporary cease and desist order did not render this action moot because they did not consent to the dismissal. Although petitioners did not consent to the NCUA's dismissal of the temporary cease and desist order, petitioners' counsel did concede in response to questioning by the district judge at the hearing that the effect of the dismissal was to render the action moot. *See* J.A. at 106. The petition challenging the temporary cease and desist order requested that the order be set aside. Thus, when the NCUA dismissed the temporary cease and desist order prior to the hearing, the petition became moot because petitioners received the relief they requested. *See International Union v. Dana Corp.*, 697 F.2d 718, 720 (6th Cir. 1983) (en banc). Moreover, we note that this is not the type of case to which the "capable-of-repetition,

yet evading review" exception to mootness is applicable. That exception applies to cases which evade review because the practice at issue is inherently short in duration even though capable of repetition. See Conyers v. Reagan, 765 F.2d 1124, 1128 (D.C. Cir. 1985) (elections, trials, pregnancies, and public school years). Because petitioners received the relief requested and conceded the mootness issue in the district court, we hold that the district court properly dismissed as moot the petition challenging the temporary cease and desist order.

B. Conservatorship

In the petition challenging the conservatorship, petitioners requested that the order of conservatorship be vacated and set aside and that the NCUA be required to show cause why it should not be enjoined from continuing possession and control of the credit union.[2] At the conclusion of the hearing on the petition, the district judge orally ruled that the NCUA's imposition of the conservatorship was not arbitrary and capricious and that "the procedure was carried out in precisely the manner the statute provided." J.A. at 276. The district judge also made the following findings of fact: "The credit union is losing money, it has suffered operating losses, it had operating problems, there's a serious problem in the contracting procedure and possible conflicts of interest. . . ." J.A. at 275-76.

On January 31, 1990, the district court entered an order incorporating the oral findings of fact and conclusions of law stated at the hearing. The district court indicated that the standard of review under the Federal Credit Union Act is restricted to determining whether the actions taken by the NCUA were arbitrary and capricious. The district court stated:

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[2]The NCUA asserts that petitioners' challenge to the conservatorship has been rendered moot because the credit union has been liquidated by the State of Tennessee, and purchased and assumed by another credit union. However, this was not in the record before the district court, and it is not properly before this court.

> The administrative record and the testimony and exhibits introduced at the hearing of this matter demonstrate that the Administration had a reasonable basis for its determination that a conservatorship was necessary under the standards of 12 U.S.C. §1786(h)(1)(A). Further, the proof and exhibits put forth by the plaintiffs failed to demonstrate that the actions of the Administration were arbitrary and capricious.

J.A. at 74.

Petitioners assert that the standard of review is broader than that employed by the district court, but they do not indicate what the standard should be, and they do not cite any authority for a different standard. Independent research has revealed no case stating the standard for reviewing the NCUA's *ex parte* appointment of itself as conservator under section 1786(h)(1).

In the absence of explicit authority on this issue, we employ the standard used by the Fifth and Eleventh Circuits to review a decision of the Federal Home Loan Bank Board (FHLBB) to appoint a receiver or conservator. *See Alliance Federal Savings and Loan v. FHLBB*, 782 F.2d 490, 493 (5th Cir. 1986); *Biscayne Federal Savings and Loan v. FHLBB*, 720 F.2d 1499, 1503 (11th Cir. 1983), cert. denied, 467 U.S. 1215 (1984). These cases hold that the sole inquiry on judicial review is whether a statutory ground existed for the FHLBB's appointment of a conservator or a receiver.

Section 1786(h)(1) specifies four circumstances in which the NCUA Board may, *ex parte* without notice, appoint itself as conservator of an insured credit union:[3]

---

[3]Petitioners assert that they were denied due process by imposition of the conservatorship prior to a hearing. We dispose of this argument on the basis of the Supreme Court's ruling in *Fahey v. Mallonee*, 332 U.S. 245, 67 S. Ct. 1552 (1947), which upheld a pre-hearing seizure

> (A) the Board determines that such action is necessary to conserve the assets of any insured credit union or to protect the Fund or the interests of the members of such insured credit union;
>
> (B) an insured credit union, by a resolution of its board of directors, consents to such an action by the Board;
>
> (C) there is a willful violation of a cease-and-desist order which has become final; or
>
> (D) there is concealment of books, papers, records, or assets of the credit union or refusal to submit books, papers, records, or affairs of the credit union for inspection to any examiner or to any lawful agent of the Board.

12 U.S.C. §1786(h)(1).

At the conclusion of the hearing, the district court found that the credit union was losing money, had suffered operating losses, had operating problems, had serious problems with its contracting procedure, and a possible conflict of interest. The district court's findings are supported by the testimony of James Richardson and Ben Mauldin regarding the rapidly deteriorating financial condition of the credit union. The district court concluded that the record indicated that the NCUA had ample reason under the statute to impose the conservatorship.

Petitioners do not challenge the district court's findings regarding the financial condition of the credit union. The district court's findings support the NCUA's imposition of the conservatorship pursuant to section 1786 (h)(1)(A) to conserve the assets of the credit union, to protect the share insurance fund, and to protect the interests of the credit union members. Based on these undisputed findings, we hold that a statutory ground existed for the NCUA to

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of bank assets by a conservator appointed by the Federal Home Loan

impose the conservatorship pursuant to section 1786(h)(1)(A).[4]

III.

For the reasons stated, we AFFIRM the district court's judgments and orders of dismissal in both cases.

Administration.

[4]We dispose of other arguments by petitioners as being meritless or raised for the first time on appeal. *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 2877 (1976).

UNITED STATES OF AMERICA
NATIONAL CREDIT UNION ADMINISTRATION
NATIONAL CREDIT UNION ADMINISTRATION BOARD

IN THE MATTER OF
THE CEASE AND DESIST OF;
Mr. J. Gordon Bingham, Jr.
Mrs. Brenda H. Bingham #891202-III
First Central Data Services
First Central Financial Services
Employee Insurance Consultants

CONSOLIDATED NOTICE OF CHARGES AND HEARING
TEMPORARY CEASE AND DESIST ORDER

Pursuant to Section 206(e)(1) of the Federal Credit Union Act (12 U.S.C. Section 1786-(e)(1), Mr. J. Gordon Bingham, Jr., Mrs. Brenda H. Bingham, First Central Data Services, First Central Financial Services, Employee Insurance Consulatants (hereinafter "Respondents") are hereby notified that a hearing will be held to determine whether, based on the allegations set forth below, a cease and desist order should be issued requiring them to permanently cease and desist from the practices cited below. This hearing will be conducted in accordance with the Rules of Practice and Procedure in Part 747 of the National Credit Union Administration Rules and

Regulations (12 C.F.R. Part 747), and at such time and place set forth below.

Pending final determination after hearing and pursuant to Section 206(f)(1) of the Federal Credit Union Act 12 U.S.C. Section 1786(f)(1):

A. The Respondents are ordered to immediately cease and desist:

1. From interfering with or impeding the National Credit Union Administration Board (NCUAB) and its Agents, either directly or indirectly, in the exercise of its statutory functions and duties as conservator of First Central Credit Union of Memphis (Credit Union), and from causing, bringing about, partricipating in, counseling, or aiding or abetting, either directly or indirectly, any unsafe or unsound activity with respect to the credit union or its operations.

2. From entering the credit union premises without the written permission of the conservator or its agents, unless such entry is in connection with their duties as

landlord. In that situation, the conservator shall be notified so that arrangements may be made for NCUA personnel to be present.

B. The Respondents are immediately ordered to:

1. Continue to provide adequate space for the credit union as provided for in the lease agreement, until a determination is made by the conservator on the continuation of the lease agreement;

2. Continue to provide data processing services as provided for in the data processing contract, until a determination is made by the conservator on the continuation of the contract; and,

3. Provide all requested information both orally and/or in writing, as prescribed, in a timely manner to the NCUAB or its Agents.

This temporary order is necessary based on the determinatin that the parties in the past have put their own interests ahead of the interests of the credit union. As set forth in the charges, there is reasonable cause to

believe the Respondents are about to engage in an unsafe or unsound practice and are about to violate provisions of the Federal Credit Union Act (12 U.S.C. Sections 1551 et. seq.). If this were to occur when the credit union is being placed into conservatorship, it is likely to cause significant dissipation of assets or earnings or the credit union, or it is likely to weaken the condition of the credit union or otherwise prejudice the interest of the insured members. This order is effective immediately upon service. This order will remain in effect pending the administrative hearing provided by this Notice and until such time as the National Credit Union Administration Board (NCUAB) shall dismiss the charges specified in this Notice, unless the temporary order is stayed by a court under Section 206(f)(2) of the Federal Credit Union Act 12 U.S.C. 1786(f)(2).

Charges:

I. The NCUAB has reasonable cause to believe that the Respondents are about to engage in an

unsafe and unsound practice. Of particular concern to the UCUAB is the data processing services provided by First Central Data Services. If the Binghams were to discontinue this service, the credit union would be unable to provide necessary services to its members, and in all liklihood, would have to temporarily cease operations. Since the Binghams own the building where the credit union does business, there is a reason to believe they could attempt to deny access to the agents for the conservator or they could enter the credit union without the permission of the conservator and destroy, remove, or corrupt the books and records of the credit union.

Facts:

In June, 1987, the NCUA Regional Director advised the credit union's attorney that if the board of direcors entered into any contracts with the Binghams without his expressed approval and the expressed approval of the Commissioner of the Tennessee Department of Financial Institutions, he would

consider this to be an unsafe and unsound act and would consider taking administrative action. The credit union and the Binghams ignored this warning and in December, 1988, the board of directors entered into four contracts with companies owned by the Binghams. These contracts were for:

A. The management of the credit union;

B. The exclusive right of the Binghams' insurance company to market insurance services to the credit union's field of membership and for the exclusive right to have deductions made directly to the members' share accounts for the payment of insurance premiums;

C. The provision of data processing services; and,

D. The leasing of real and personal property.

As anticipated by the Regional Director when he issued his warning, the credit union is now experiencing severe financial problems. These problems arise from the inability or

unwillingness of management to effectively control the affaairs of the credit union. In addition, the contracts between the treasurer and the credit union have contributed to high operating expenses, large operating losses, and the erosion of equity. These contracts have also provided material benefit to Mr. and Mrs. Bingham at the expense of the credit union and its membership.

The Binghams' actions are self serving in nature. Their actions have put the National Credit Union Share Insurance Fund (NCUSIF) into jeopardy. The Binghams' have been given several opportunities to reduce their control and the price of the contracts to assist the credit union's financial position. They continually refuse to make substantial changes to the contracts. Based on the Binghams' unwillingness to cooperate in the past and their virtual control over every area of the credit union's operation, it is likely that they will put their own interest ahead of the credit union by engaging in unsafe and unsound

practices.

II. The NCUAB has reasonable cause to believe that Respondents are about to violate provisions of the Federal Credit Union Act, including 12 U.S.C. 1786(h) and 1787(b)(2)(B), which provide that the NCUAB may, ex parte and without notice, take over the assets of and operate the credit union with all the powers of the members, the directors, and the officers of the credit union; conduct all business of the credit union; perform all functions of the credit union in the name of the credit union; and preserve and conserve the assets and property of the credit union. As stated in Charge I, the Respondents have control of the credit union's data processing equipment, as well as its building. This situation coupled with their previous actions gives the NCUAB reasonable cause to believe they may interfere with the lawful activities of the conservator.

Facts:

On December 14, 1989, the NCUAB placed First

Central Credit Union into Conservatorship. The conservator under 12 U.S.C. 1786(h)(8) and 1787(b)(2)(B) has the power to, ex parte and without notice, take over the assets of and operate the credit union with all the powers of the members, the directors, and the officers of the credit union; conduct all business of the credit union; perform all functions of the credit union in the name of the credit union; and preserve and conserve the assets and property of the credit union. Based on the facts as previously alleged, it is anticipated that the parties may interfere with the NCUA's lawful exercise of these statutory powers.

Notice of Hearing:

Based on the foregoing, a hearing shall be held to determine whether an order to cease and desist from the practices set forth should be issued to the Respondents. This hearing shall be conducted in accordance with the provisions of the Federal Credit Union Act 12 U.S.C. Section 1751, et seq., and Part 747 of the

National Credit Union Administration Rules and Regulations 12 C.F.R. 747.01 et seq., and will take place at a time and place to be set, for which timely notice will be given.

In accordance with the Provisions of 12 C.F.R. 747.104, the Respondents are hereby directed to file an answer to the charges contained herein, such answer to be filed with this Agency within 20 days of service of this Notice. The answer, as provided for in 12 C.F.R. 747.104, must specifically admit, deny, or state that the Respondents do not have suffsicient information to admit or to deny each allegation contained herein. A statement of lack of information shall have the effect of denial. Any allegation not denied shall be deemed admitted. If Respondents intend to deny only a part of an allegation, they shall specify so much of it is true and shall deny only the remainder.

If the Respondents do not contest any of the allegations set forth herein, their answer shall consist of statements that they admit

all the allegations to be true. Such an answer shall constitute a waiver of hearing as to the facts alleged in the Notice, as provided in 12 C.F.R. 747.104. As provided in 12 C.F.R. 747.104(d), failure to file an answer shall be deemed a waiver of the right to appear and contest the allegations herein, and authorization to the National Credit Union Administration Board to find the facts to be as alleged and to issue an appropriate order.

In accordance with the provision of 12 C.F.R. 747.102, it is hereby directed that the Respondent parties or their representataives file a written notice of appearance in this matter with the National Credit Union Administration Board. If the representatives are not attorneys, they must file with the National Credit Union Administration Board a power of attorney indicating their authority to act as the respondents' representative(s) before commencement of the hearing.

As provided in Section 206(f)(2) of the Federal Credit Union Act 12 U.S.C. Section

1786(f)(2), you may within 10 days after service of this temporary order, apply to the U.S. District Court for the judicial district in which your home office is located, or the U.S. District Court for the District of Columbia, for an injunction setting aside, limiting, or suspending enforcement, operation or effectiveness of this temporary order, pending the completion of the administrative proceeedings pursuant to this order.

Pursuant to 12 U.S.C. 1786 (k)(2)(A),(B),-(C) and (D), and notwithstanding the foregoing statutory right of challenge, failure by any Respondent to immediately comply with the terms of this temporary order, or of any final order issued by the Board pursuant to these proceedings, may result in civil money penalties of up to $1,000,000 per day.

Dated this 14th day of December, 1989.

National Credit Union
Administration Board by

s/ John S. Ruffin
Regional Director
Region III, Atlanta

This is to certify that on the 15 of December, 1989 I personally served a copy of the foregoing order upon

First Central Financial Service

s/ Michael D. Benedetto

s/ Agent for the Conservator

NATIONAL CREDIT UNION ADMINISTRATION
REGION III

UNITED STATES OF AMERICA
NATIONAL CREDIT UNION ADMINISTRATION
NATIONAL CREDIT UNION ADMINISTRATION BOARD

IN THE MATTER OF THE
CONSERVATORSHIP OF FIRST #891201-III
CENTRAL CREDIT UNION

ORDER OF CONSERVATORSHIP

To the Board of Directors and Other Officials
of First Central Credit Union of Memphis
Certificate Number #64278

ORDER

Notice is hereby given with the written concurrence of the Tennessee Department of Financial Institutions (TDFI) that, pursuant to Section 206(h)(1) of the Federal Credit Act, 12 U.S.C. Sec. 1786(h)(1), the National Credit Union Administratin Board, (NCUA Board), has appointed itself as Conservator of First Central Credit Union of Memphis (the Credit Union) for reasons specified below. By such appointment the Conservator is exercising its authority to immediately take possession and control of the business and assets of the Credit Union.

The Board of directors of the Credit Union, and any of its officers, employees, or agents are hereby ordered to turn over and release all books, records, accounts, documents, assets, and property, both real and personal, of every description of the Credit Union to John S. Ruffin, who by this Order of Conservatorship and accompanying letter of appointment is designated as Agent for the Conservator, or to any agent appointed by the Agent for the Conservatorship including but not limited to Bradley L. Sanders, Gary F. Gaines, James Q. Richardson, Michael J. DiBenedetto, and Ben G. Mauldin.

This order is effective upon service, and the Conservator is immediately vested with all the powers of the members, the directors, the officers and the committees of the Credit Union. The board of directors is further ordered to cease all activity on behalf of the Credit Union immediately upon service of this Order and is further informed that any business purportedly conducted on behalf of

the Credit Union may subject such officials to civil and/or criminal liability.

The NCUA Board has determined that such action is necessary in order to conserve the assets of the Credit Union and to protect the National Credit Union Share Insurance Fund (NCUSIF) and the interests of the members of the Credit Union because of the unsafe and unsound practices, lack of effective Credit Union Board control and probable impairment of the Credit Union. It is critical that these problems be resolved immediately and that steps be taken to limit the potentially serious risk to the Credit Union's assets, the interest of its members and the NCUSIF.

BACKGROUND

The Credit Union was chartered on October 25, 1977 and serves employee groups over a wide geographic area of Western Tennessee. The Credit Union offers the basic services of shares, share drafts, club accounts, share certificates, and various consumer loans. In addition, the Credit Union offers real estate

loans on a limited basis. As of December 31, 1983, the Credit Union was serving over 200 different employee groups, had 5,554 members and had assets of approximately $1.6 million. Currently, the Credit Union serves approximately 600 companies, has 16,771 members and has reached $6.7 million in assets.

In April 1981, the board of directors signed an agreement with Bingham Enterprises to manage the credit union and maintain the necessary records. Bingham Enterprises is a proprietorship of Mr. J. Gordon Bingham, Jr., who is the treasurer of First Central Credit Union of Memphis. Under this contract, Bingham Enterprises would receive 29.5 percent of the credit union's gross income. In addition, the contracts gave exclusive rights to Mr. Bingham through Bingham Enterprises to market any insurance product that might be advantageous to the credit union members. In December 1982, the contract was extended through December 31, 1989, and in March 1983 the board of directors increased the percent-

age of gross income payable to Bingham Enterprises under the contract to 40 percent of gross income. In December 1988, the board of directors signed new contracts which superseded those signed in December 1982. These new contracts eliminated the provision to pay Bingham Enterprises 40 percent of gross income and replaced this provision with specific compensation requirements. In addition, these new contracts required the credit union to begin absorbing operating expenses which Bingham Enterprises had previously covered through its contractual fee of 40 percent of gross income.

Since the beginning of the relationship with Mr. Bingham,, the credit union's involvement with the various insurance products contined to increase significantly.

Due to the actions of management and the board of directors, the Credit Union is experiencing unacceptable levels of loan losses, excessive operating expenses, material and damaging operating losses, and an

erosion of equity.

NATIONAL CREDIT UNION ADMINISTRATION INVOLVMENT

The National Credit Union Administration (NCUA) first became involved with the Credit Union when an insurance review was conducted with an effective date March 31, 1984. This review was conducted as a result of concerns over the relatively high level of delinquent loans and loan losses and over the provisions of the management contract between the Credit Union and Bingham Enterprises.

Since that time, NCUA has been heavily involved in the on-site supervision of the Credit Union. This continuing supervision was considered necessary due to the Credit Union's weak financil condition, the concerns over various contract provisions and the degree of risk which the Credit Union presented to the NCUSIF. The most recent insurance review was completed on April 14, 1989 and culminated in the issuance of a Letter of Understanding and Agreement which was

signed by the officials on July 27, 1989. Several on-site, follow-up supervision contacts have been made since that time in order to monitor the progresss of the credit union in overcoming its financial and operating deficiencies and to determine the degree of compliance with the Letter of Understanding and Agreement.

The most recent insurance review and the subsequent supervision contacts revealed problems of such significance that they pose an immediate and real threat to the viability of the Credit Union as well as a risk to the NCUSIF. As of October 31, 1989, the problems listed below existed.

I. EXCESSIVE LOAN LOSSES

The board of directors and management have failed to properly control lending and collection policies and programs. As a result, the credit union has suffered significant losses from uncollectable loans. Despite modifications which have been made to these programs, losses have continued to

escalate. During the current calendar year, the credit union has suffered net loan losses of $216,631 or 54 percent of the credit union's total capital which existed on January 1, 1989. This loss rate is approximately nine times greater than that of similar sized credit unions. The current loan portfolio still contains a significant number of high risk loans which have not yet defaulted.

For the years 1984 through 1988, the credit union's ratio of net loan losses was consistently greater than that of its peer credit unions. The credit union's average loss ratio for the period was more than 300 percent greater than that of its peers. Despite this poor performance history, the management of the credit union failed to evaluate the problem and correct the deleterious deficiencies.

It is projected that continued loan losses at the levels experienced during 1989 will deplete reserves within the next four to six months.

II. PROFITABILITY

Management and the board of directors have failed to provide adequate budgetary contraol over the operations of the credit union which has resulted in material and unacceptable levels of net operating losses.

Though the financial statements indicated that the credit union had maintained a positive net earnings position through December 1988, profitability had, in fact, been propped up through the issuance of extremely high risk loans. Once these high risk loans began to surface and become non-producing assets a more true reflection of the credit union's profitability position began to emerge. In addition, as a result of the new contracts entered into in December 1988 between the credit union and the various companies owned by Mr. and Mrs. Bingham the operating expenses of the credit union dramatically increased. During the first 10 months of 1989, the credit union experienced an annualized net loss equal to 4.78 percent of

average assets. These losses are directly attributable to the unacceptable level of loan losses, the lack of budgetary control, and excessive levels of operating expenses.

The previous contract under which the Bingham's managed the credit union's operations called for the credit union to pay to Bingham Enterprises 40 percent of gross income, from which Bingham Enterprises would pay the majority of the credit union's operating expenses. Under this contract, the credit union's operating expenses as a percentage of gross income equalled 46.9, 46.9 and 51.6 percent for the years 1986, 1987 and 1988, respectively. On an average, this equates to an operating expense to gross income ratio which was 39 percent above that of the credit union's peers. The contracts entered into in December 1988 required the credit union to provide specific compensation for the services being rendered by the various companies owned by the Binghams plus absorb the other operating expenses previously

covered by Bingham Enterprises. As a result, operating expenses increased. For the current year to date the credit union's ratio of operating expenses to gross income equals approximately 75 percent which is 114 percent higher than that of its peer group. For the month of October 1989 this ratio equalled approximately 85 percent.

Budgets prepared during early 1989 were unrealistic and unsupportable. In August 1989, management presented a budget for the months of July 1989 through June 1990 which indicated that the credit union would rech a sustained positive net earnings position in 1990. In October 1989 management and board of directors presented a revised budget for the months of January through December 1990 which projected a net gain of $105,090 for the year ending December 31, 1990. However, the credit union has fallen short of its projected net earnings position for the months of September and October 1989. For the month of September the budget projected $95,497 in gross income

and a net operating loss of $6,958. Actual results of operations for that month was $89,419 in gross income and a net operating loss of $23,522. October's budget called for gross income of $81,778 and a net operating loss of $20,936, but the credit union actually realized only $72,187 in gross income and suffered a net operating loss of $103,839.

The method in which management has attempted and continues to attempt to increase and improve profitability is to raise the fees charged to the members. For the years of 1987 and 1988, fee income equalled 2.2 and 2.4 percent of average assets, respectively, and also equalled approximately 17 percent of gross income. Through October 1989, fee income has increased roughly 60 percent and now equals approximately 23 percent of gross income and 3.5 percent of average assets. As a point of comparison, the average ratio of fee income to gross income of similar size Federally-insured State-chartered credit unions was only four percent through June 30,

1989. The credit union's 1990 operating budget projects an additional 35 percent increase in fees and charges while, at the same time, operating expenses are budgeted to remain relatively constant.

The negative and material impact from the new contracts on the profitability of the credit union, the high and escalating levels of fee income, plus the failure of management to reduce and control operating expenses indicate that the budgetary process is geared toward benefiting the Binghams at the expense of the members.

III. CAPITAL EROSION

Management and the board of directors has failed to preserve the equity of the credit union.

As of October 31, 1989, the credit union has a total of $118,385 in the Regular Reserves and Undivided Earnings accounts, representing a $228,988 or 64 percent decrease in these accounts since January 1, 1989. During that same period of time, the Undivided Earnings

account has decreased from $69,920 to a deficit balance (taking current net income and Tennessee reserving requirements into consideration). As of October 31, 1989 the credit union's Net Capital to Assets ratio equals less than two percent.

As a result of this erosion of capital, the credit union may be unable to legally meet its current divident levels in December 1989. It is also projected that at the current rate of decline the credit union will deplete its Regular Reserves and Undivided Earnings accounts within the next four to six months and become insolvent. This erosion of capital represents a material and unacceptable level of risk to the NCUSIF.

IV. UNSAFE AND UNSOUND CONTRACTS

The board of directors have entered into various contracts with companies owned by Mr. Bingham and his wife. These contracts are considerred to be unreasonable and profit the treasurer to the detriment of the credit union. The contracts have contributed to the

continued losses being experienced by the credit union, are burdensome and materially threaten the NCUSIF.

In his June 25, 1987 response to a letter from the credit union's attorney, the Regional Director stated that if the board of directors entered into any contracts with the Binghams without his expressed approval and the expressed approval of the Commissioner of the Tennessee Department of Financial Institutions, he would consider that to be an unsafe and unsound act and would consider taking administrative action; however, in December 1988, the board of directors entered into four separate contracts with companies owned by Mr. Bingham. These contracts were for:

A. The management of the credit union.

B. The exclusive right of the Binghams' insurance company to market insurance services to the credit unions' and for the exclusive right to have deductions made directly from the members' share accounts for the payment of insurance premiums;

C. The provision of data processing services; and

D. The leasing of real and personal property.

The first three contracts each have maturity terms of seven years and the contract for the leasing of real and personal property has a fifteen-year term. Each contract contains a successor clause making the contracts binding on any future merger partner. In addition, the contracts for the leasing of the real property and for the data processing services are in violation of Chapter 0180-9-1-.02 of Tennessee's Department of Financial Institutions' Rules.

These contracts materially affected the operations of the credit union. For the year ending December 31, 1988, operating expenses equalled 51.6 percent of gross income, a high level in and of itself; however, the additinal costs directly related to the new contracts plus the absorption of additional expenses as required by these contracts increased the

level of operating expenses to 75 percent of gross income for the current year to date. Of the total operating expenses incurred through October 1989, 40 percent can be directly traced to payments or liabilities to companies owned by Mr. Bingham.

The budgets were entered into without reasonable budgetary analysis by the board of directors, and, even more significantly, the board of directors has obligated the credit union to contracts which give extensive control to Mr. Bingham over several areas of operation and for extended periods of time.

V. FAILURE TO COMPLY WITH THE LETTER OF UNDERSTANDING AND AGREEMENT

On July 27, 1989, management and the board of directors entered into a Letter of Understanding and Agreement between the credit union's officials, TDFI and NCUA in which they agree, among other things, to:

A. Achieve and maintain a net capital to asset ratio equal to at least 4.0 percent;

B. Achieve and maintain a net income

position equal to 0.20 percent of average assets;

C. Maintain the Allowance for Loan Losses account at an amount equal to the greater of the total of loans determined to be doubtful or loss through an individual classification or through the State's requirement of 25 percent of loans delinquent two to six months delinquent and 75 percent of loans delinquent six to twelve months delinquent; and

Management and the board of directors have failed to make progress toward meeting these major provisions of the outstanding Letter of Understanding and Agreement. Net capital has declined to 1.8 percent of assets as of October 31, 1989, net income from operations equals a net loss of 4.78 percent of assets, and the board of directors has failed to properly maintain the allowance for loan losses account. Only after specific direction from NCUA during the October NCUA supervision contact did the board of directors

charge off $60,000 in bad debts and increase the Allowance for Loan Losses account by more than $90,000 in order to meet full and fair disclosure requirements.

The failure of management and the board of directors to make progress toward meeting these provisions of the Letter of Understanding and Agreement indicates an unwillingness or inability to properly direct and control the operations of the credit union thereby creating an unacceptable degree of risk for the NCUSIF.

SUMMARY

The credit union has been operated in an unsafe and unsound manner and is experiencing severe operating and financial problems which threaten its continued existence. These problems arise from the inability or unwillingness of management to effectively control the affairs of the credit union. In addition, the contracts between the treasurer and the credit union have contributed to the high operating expenses, the high operating losses

and the erosion of equity. These contracts have also provided material benefit to Mr. Bingham at the expense of the credit union and its membership. If current trends continue, it is anticipated that the credit union will be insolvent within the next 12 months.

Due to the actions of management and the credit union's current financial and operating condition, this credit union is considered to be, in essence, a money making scheme for the Bingham's, and the NCUSIF is being materially threatened by the unacceptably high level of loan losses, the lack of budgetary control, the significant operating losses, and the actions of the treasurer.

In order to conserve the assets of the credit union and protect both the interest of the NCUSIF and the members of the credit union. it is necessary for the NCUA Board to place First Central Credit Union of Memphis into conservatorship and appoint itself as Conservator. In accordance with the Agency's responsibilities under the Federal Credit

Union Act, this conservatorship action is being taken to provide sufficient opportunity for the Agency to maintain control of the credit union until such time as it is assured that the present and potential problems have been, or will soon be corrected and any risks to interested parties have been overcome or substantially reduced.

ORDER OF NONPUBLICATION

Due to the fact that the Credit Union will remain in operation during the Conservatorship imposed hereby and the nature of the charges contained herein could, if made public, cause damage to the Credit Union or otherwise hinder the ability of the Conservator to maintain normal operations and to protect the assets of the Credit Union, interest of the members, the NCUSIF, and other individuals involved, it is hereby ORDERED that this Order of Conservatorship and any of its contents shall not be disclosed or otherwise made public except to the extent authorized or deemed appropriate by the Conservator of the Agent or Subagents for

the Conservator.

NOTICE

No later than ten days after the date this Order is delivered, the board of directors may, pursuant to an appropriate board of directors's resolution, apply to the United States District Court for the judicial district in which the principal office of the Credit Union is located, or the United States District Court of the District of Columbia, for an order requiring the NCUA Board to show cause why it should not be enjoined from continuing possession and control of the Credit Union. Costs and expenses of such a challenge, including attorneys' fees, may only be paid out of credit union's assets if the board of directors prevails on the merits.

Dated this 14th day of Dec. 1989.

NATIONAL CREDIT UNION
ADMINISTRATION BOARD

s/ By John S. Ruffin
JOHN S. RUFFIN
Regional Director

CERTIFICATE OF SERVICE

This is to certify that on behalf of the First Central Credit Union of Memphis, I have received the Order of Conservatorship dated _____, 19 __.

_____ _____
Date Signature

_____
Title

I hereby certify that the foregoing Order of Conservatorship was served on First Central Credit Union of Memphis by personal delivery to:

_____

_____ _____
Date Signature

_____
Title

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

(Stamped filed
4:30 p.m.,
Jan. 16, 1990)

J. GORDON BINGHAM, JR.
Plaintiff,

vs. No. 89-3138-HB

NATIONAL CREDIT UNION
ADMINISTRATION BOARD,
Defendant

NOTICE OF FILING OF NOTICE OF DISMISSAL
OF TEMPORARY CEASE AND DESIST ORDER
AND NOTICE OF CHARGES AND HEARING

The undersigned Assistant United States Attorney hereby gives notice that the National Credit Union Administration Board has issued a Notice of Dismissal of Temporary Cease and Desist Order and Notice of Charges and Hearing, which is hereby being filed with this court. The notice is attached hereto.

Respectfully submitted,

W HICKMAN EWING, JR.
s/ By Joe A. Dycus
JOE A. DYCUS
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I, Joe A. Dycus, Assistant United States Attorney for the Western District of Tennessee, hereby certify that a copy of the foregoing Notice has been mailed, first class postage pre-paid, to plaintiff's attorney of record, Albert H. Boyd, Esquire, 424 N. McNeil, Memphis, Tennessee 38112.

This 16th day of January, 1989.

s/ Joe A. Dycus
JOE A. DYCUS
Assistant U.S. Attorney

NATIONAL CREDIT UNION ADMINISTRATION

REGION III

UNITED STATES OF AMERICA
NATIONAL CREDIT UNION ADMINISTRATION
NATIONAL CREDIT UNION ADMINISTRATION BOARD

IN THE MATTER OF
THE CEASE AND DESIST OF:
Mr. J. Gordon Bingham, Jr.
Mrs. Brenda H. Bingham #891202-III
First Central Data Services
First Central Financial Services
Employee Insurance Consultants

NOTICE OF DISMISSAL OF TEMPORARY CEASE AND DESIST ORDER AND NOTICE OF CHARGES AND HEARING

Pursuant to Sections 206(e)(2) and (f)(1) of the Federal Credit Union Act (12 U.S.C. Sections 1786 (e)(2) and (f)(1)) J. Gordon Bingham, Jr., Brenda H. Bingham, First Central Data Services, First Central Financial Services, and Employee Insurance Consultants are hereby notified that Charges in the Consolidated Notice of Charges and Hearing and the Temporary Cease and Desist Order have been dismissed by the National Credit Union Administration Board.

The Board has determined that based on present conditions, the Cease and Desist Orders are no

longer necessary.

Dated this 16th day of January, 1990.

National Credit Union
Administration Board by

s/ John S. Ruffin
Regional Director
Region III, Atlanta

7000 Central Parkway Suite 1600
Atlanta, Georgia 404--396--4042

PART 747

Administrative Actions,
Adjudicative Hearings, and
Rules of Practice and Procedure

Section 747.01 Scope.

(a) This Part describes the various administrative adjudicative actions available to the National Credit Union Administration Board, the grounds for those actions and the procedures used in hearings related to each available action. The administrative actions described herein, as well as the grounds and hearing procedures for each, are controlled by Sections 120(b) (except where the Federal credit union is closed due to insolvency), 206 and 304(c)(3) of the Federal Credit Union Act. Should any provision of this Part be inconsistent with these, or any other provisions of said Act, as amended, the Act shall control. Judicial enforcement of any action or order described in this Part, as well

as judicial review thereof, shall be as prescribed under the Federal Credit Union Act (12 U.S.C. Sec. 1751 et seq.) (hereinafter Act) and the Administrative Procedure Act (5 U.S.C. Sec. 500 et seq.)

(b) As used in this Part, the term insured credit union means any Federal credit union or any state chartered credit union insured under Subdchapter II of the Act unless the context indicates otherwise.

5 U.S.C. SEC. 706. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this

rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

* * *

Definition of "and." "It expresses a general relation or connection, a participation or accompaniment in sequence, having no inherent meaning standing alone but deriving force from what comes before and after. In its conjunctive sense the word is used to conjoin words, clauses, or sentences, expressing the relation of addition or connection, and signifying that something is to follow in addition to that which proceeds and its use implies that the connected elements must be grammatically co-ordinate, as where the elements preceding and succeeding the use of the words refer to the same subject matter. While it is said that there is no exact synonym of the word in English, it has been defined to mean "along with," "also," "and also," "as well as," "besides," "together with."[1] (Citation omitted.)

Definition of "or." "A disjunctive particle used to express an alternative or to give a choice of one among two or more things....

"Or is frequently misused; and courts will construe it to mean "and" where it was so used."[2] (Citations omitted.)

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[1]Henry Cambell Black, **Black's Law Dictionary,** 4th ed., (St. Paul MN: West Publishing Co., 1951), p. 112.

[2]**Ibid.**, p. 1246.

12 U.S.C. SEC. 1464(d)(6)(A):

The grounds for the appointment of a conservator or receiver for an association shall be one or more of the following: (i) insolvency in that the assets of the association are less than its obligations to its creditors and others, including its members; (ii) substantial disipation of assets or earnings due to any violation or violations of law, rules, or regulations, or to any unsafe or unsound practice or practices; (iii) an unsafe or unsound condition to transact business; (iv) willful violation of a cease-and-desist order which has become final; (v) concealment of books, papers, records, or assets of the association or refusal to submit books, papers, records, or affairs of the association for inspection to any examiner or to any lawful agent of the Board. The Board shall have exclusive power and jurisdiction to appoint a conservator or receiver. If, in the opinion of the Board, a ground for the appointment of a conservator or receiver as

herein provided exists, the Board is authorized to appoint ex parte and without notice a conservator or receiver for the association. In the event of such appointment, the association may, within thirty days thereafter, bring an action in the United States district court for the judicial district in which the home office of such association is located, or in the United States District Court for the District of Columbia, for an order requiring the Board to remove such conservator or receiver, and the court shall upon the merits dismiss such action or direct the Board to remove such conservator or receiver. Upon the commencement of such an action, the court having jurisdiction of any other action or proceeding authorized under this subsection to which the association is a party shall stay such action or proceeding during the pendency of the action for removal of the conservator or receiver.

12 U.S.C. SEC. 1786(e)(1)(2):

(e) Opinion of Board as to unsound condition of credit union; notice of charges; hearing; order to cease and desist; judicial review.

(1) If, in the opinion of the Board, any insured credit union, credit union which has insured accounts, or any institution-affiliated party is engaging or has engaged, or the Board has reasonable cause to believe that the credit union or any institution-affiliated party is about to engage, in an unsafe or unsound practice in conducting the business of such credit union, or is violating or has violated, or any institution-affiliated party is about to violate, a law, rule, or regulation, or any condition imposed in writing by the Board in connection with the granting or any application or other request by the credit union or any written agreement entered into with the Board, the Board may issue and serve upon the credit union or such party a notice of charges in respect thereof. The notice shall contain a statement of the

facts constituting the alleged violation or violations or the unsafe or unsound practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the credit union or the institution-affiliated party. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after service of such notice unless an earlier or a later date is set by the Board at the request or any party so served. Unless the party or parties so served shall appear at the hearing by a duly authorized representative, they shall be deemed to have consented to the issuance of the cease and desist order. In the event or such consent, or if upon the record made at any such hearing, the Board shall find that any violation or unsafe or unsound practice specified in the notice of charges has been established, the Board may issue and serve upon the credit union or the institution-affiliated party an order to cease

and desist from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the credit union or its institution-affiliated parties to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.

(2) A cease-and-desist order shall become effective at the expiration of thirty days after the service of such order upon the credit union or other person concerned (except in the case of a cease-and-desist order issued upon consent, which shall become effective at the time specified therein), and shall remain effective and enforceable as provided therein, except to such extent as it is stayed, modified, terminated, or set aside by action of the Board or a reviewing court.

12 U.S.C. SEC. 1786(f)(1):

(f) Temporary cease and desist order; injunctive procedure

(1) Whenever the Board shall determine that the violation or threatened violation or the unsafe or unsound practices, specified in the notice of charges served upon the credit union or any institution-affiliated party pursuant to paragraph (1) of subsection (e) of this section, or the continuation thereof, is likely to cause insolvency or substantial dissipation of assets or earnings of the credit union, or is likely to seriously weaken the condition of the credit union or otherwise seriously prejudice the interests of its insured members prior to the completion of the proceedings conducted pursuant to paragraph (1) of subsection (e) of this section, the Board may issue a temporary order requiring the credit union or party to cease and desist from any such violation or practice and to take affirmative action to prevent such insolvency, dissipation, condition, or prejudice pending

completion of such proceedings. Such order may include any requirement authorized under subsection (e)(3)(B) of this section. Such order shall becaome effective upon service upon the credit union or such institution-affiliated party and, unless set aside, limited, or suspended by a court in proceedings authorized by paragraph (2) of this subsection, shall remain effective and enforceable pending the completion of the administrative proceedings pursuant to such notice and until such time as the Administration shall dismiss the charges specified in such notice, or if a cease and desist order is issued against the credit union or such party, until the effective date of such order.

12 U.S.C. SEC. 1786(h)(1):

(h) Board's self-appointment as conservator; consultation with State; authority

(1) The Board may, ex parte without notice, appoint itself as conservator and immediately take possession and control of the business and assets of any insured credit union in any case in which--

(A) The Board determines that such action is necessary to conserve the assets of any insured credit union or to protect the fund or the interests of the members of such insured credit union;

(B) An insured credit union, by a resolution of its board of directors, consents to such an action by the Board;

(C) There is a willful violation of a cease-and-desist order which has become final; or

(D) There is concealment of books, papers, records, or assets of the credit union or refusal to submit books, papers, records, or affairs of the credit union for inspection

to any examiner or to any lawful agent of the Board.

(2) (A) In the case of a State-chartered insured credit union, the authority conferred by paragraph (1) shall not be exercised without the written approval of the State official having jurisdiction over the State-chartered credit union that the grounds specified for such exercise exist.

(B) If such approval has not been received by the Board within 30 days of receipt of notice by the State that the Board has determined such grounds exist, and the Board has responded in writing to the States's written reasons, if any, for withholding approval, then the Board may proceed without State approval only by a unanimous vote of the Board.

12 U.S.C. SEC. 1787(c)(1)(A)(B)(C):

(c) Provisions relating to contracts entered into before appointment of conservator or liquidating agent

(1) Authority to repudiate contracts

In addition to any other rights a conservator or liquidating agent may have, the conservator or liquidating agent for any insured credit union may disaffirm or repudiate any contract or lease--

(A) to which such credit union is a party;

(B) the performance of which the conservator or liquidating agent, in the conservator's or liquidating agent's discretion, determines to be burdensome; and

(C) the disaffirmance or repudiation of which the conservator or liquidating agent determines, in the conservator's or liquidating agent's discretion, will promote the orderly administration of the credit union's affairs.

Certificate of Service

I certify that three copies of the foregoing Petition for Writ of Certiorari have been served upon Mrs. Mary Rupp, Staff Attorney, National Credit Union Administration, 1776 G Street, N.W. Washington, D.C. 20456, that three copies also have been served upon the Solicitor General, Department of Justice, Washington, D.C. 20530, all via U.S. Mail, first-class postage prepaid, this 4th day of June 1991.

Albert H. Boyd

Albert H. Boyd

Attorney for Petitioners

Supreme Court, U.S.
FILED
AUG 2 1991
OFFICE OF THE CLERK

(2)

No. 90-1873

In the Supreme Court of the United States

OCTOBER TERM, 1991

J. GORDON BINGHAM, ET AL., PETITIONERS

v.

NATIONAL CREDIT UNION ADMINISTRATION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ANTHONY J. STEINMEYER
THOMAS M. BONDY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the National Credit Union Administration acted within its authority in placing a federally insured credit union into conservatorship and issuing a temporary cease-and-desist order directing certain credit union officials and companies owned by those officials not to interfere with the conservatorship.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 927 F.2d 282. The orders of the district court (App., *infra*, 1a-5a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 1991. The petition for a writ of certiorari was filed on June 4, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. First Central Credit Union of Memphis, Tennessee, was a state-chartered credit union insured under the Federal Credit Union Act. See 12 U.S.C. 1781(a). Petitioner J. Gordon Bingham was the presi-

dent of the credit union and the treasurer of its board of directors. His wife, petitioner Brenda Bingham, was the credit union's vice-president. Pet. App. 2.

In January 1989, the credit union entered into four contracts with the Binghams or companies owned by them. The first contract obligated the credit union to pay the Binghams $48,000 per year for seven years for management services. The second contract gave a data processing company owned by the Binghams the right to provide data processing services to the credit union for seven years for a fee of approximately $156,000 per year. Under a third contract, an insurance-related company owned by the Binghams was given exclusive rights, for seven years, to market insurance to credit union members and to have insurance premiums paid through payroll deductions from credit union accounts. The fourth contract was a lease for the building in which the credit union was located. The Binghams had purchased the building three years earlier for $175,000. The contract provided that the credit union would pay the Binghams $72,000 per year for 15 years to rent sixty percent of the building's space. Pet. App. 2-3.

In February 1989, an examination conducted by the National Credit Union Administration (NCUA) revealed that the credit union was operating at a net loss. NCUA officials expressed concern about delinquent loans and collection problems, as well as an increase in the credit union's operating expenses that was likely to occur as a result of the January 1989 contracts. By June 1989, it was apparent that the credit union was experiencing abnormally high losses on loans as well as excessive operating expenses. On October 31, 1989, the credit union submitted a statement of financial condition to the NCUA which revealed that the credit union had lost $273,563.23 from January through October 1989. Pet. App. 2-4.

On or about December 15, 1989, the NCUA (with the approval of the relevant state authorities, see

C.A. App. 90-91; 12 U.S.C. 1786(h)(2)(A)) issued an order appointing itself conservator of the credit union. Pet. App. 4. The order of conservatorship stated that, pursuant to 12 U.S.C. 1786(h)(1), the NCUA was taking possession and control of the credit union to conserve its assets and to protect the interests of the credit union's members and the National Credit Union Share Insurance Fund. Pet. App. 24-45; see 12 U.S.C. 1786(h)(1)(A). In addition to the conservatorship order, the NCUA issued a temporary cease-and-desist order directing the Binghams and their companies not to interfere with the NCUA in its capacity as conservator, to "[c]ontinue to provide adequate space for the credit union as provided for in the lease agreement, until a determination is made by the conservator on the continuation of the lease agreement," and to "[c]ontinue to provide data processing services as provided for in the data processing contract, until a determination is made by the conservator on the continuation of the contract."[1] Pet. App. 13. The temporary order provided that a hearing would be held to determine whether a permanent cease-and-desist order was warranted. Pet. App. 11-23; see 12 U.S.C. 1786(e) and (f).

2. Petitioners applied to the United States District Court for the Western District of Tennessee for an injunction setting aside the temporary cease-and-desist order pending the completion of administrative proceedings relating to the permanent cease-and-desist order. They also sought an order requiring the NCUA to show cause why it should not be enjoined from acting as conservator. Pet. App. 5 & n.1; see 12 U.S.C. 1786(f)(2) and (h)(3).

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[1] The Federal Credit Union Act provides that, in its capacity as conservator, the NCUA is empowered to repudiate contracts, including leases, where appropriate. 12 U.S.C. 1787(c) (1988 & Supp. I 1989). See also 12 U.S.C. 1786(h)(9), 1787(b)(2)(G)(ii) (1988 & Supp. I 1989).

After an evidentiary hearing, the district court rejected petitioners' challenge to the temporary cease-and-desist order. App., *infra*, 1a-2a. The court noted that the NCUA had withdrawn the temporary order (see Pet. App. 47-50), and that, accordingly, the question of its validity was moot. The district court also rejected petitioners' challenge to the order of conservatorship. The court found ample support in the record for the NCUA's decision to impose the conservatorship, and held that the order was not arbitrary or capricious. App., *infra*, 3a-5a.

3. The court of appeals affirmed. Pet. App. 1-10. The court of appeals agreed with the district court that petitioners' challenge to the temporary cease-and-desist order was moot. The court noted that, before the district court, petitioners' lawyer had conceded that the NCUA's dismissal of the cease-and-desist order mooted petitioners' challenge to that order. When the order was withdrawn, petitioners had received the relief they had requested. Moreover, the court of appeals concluded, the issue is not one that is capable of repetition, yet evading review. Pet. App. 6-7.

As to the conservatorship order, the court of appeals stated that "the sole inquiry on judicial review is whether a statutory ground existed for the [NCUA's] appointment of a conservator or a receiver." Pet. App. 8. The court determined that conservatorship was warranted under 12 U.S.C. 1786(h)(1)(A), which provides that the NCUA Board

> may, *ex parte*, without notice, appoint itself as conservator and immediately take possession and control of the business and assets of any insured credit union in any case in which * * * the Board determines that such action is necessary to conserve the assets of any insured credit union or to protect the [Insurance] Fund or the interests of the members of such insured credit union.

The court noted that the district judge made "undisputed findings" that the credit union "was losing money, had suffered operating losses, had operating problems, had serious problems with its contracting procedure, and a possible conflict of interest." Pet. App. 9. Accordingly, the court concluded that conservatorship was warranted under Section 1786(h)(1)(A). Pet. App. 9-10.[2]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. No further review is warranted.

1. Both courts below correctly held that petitioners' challenge to the temporary cease-and-desist order became moot when the NCUA withdrew the order. As a result of the NCUA's action, petitioners received all the relief they were seeking in the district court. Because there was nothing left for the district court to decide, the court had no occasion to hold a hearing on the cease-and-desist order or to consider the standard of review applicable to such orders. Consequently, petitioners' counsel was correct to concede in the district court that petitioners' request for an injunction was moot. C.A. App. 106.[3]

---

[2] The court of appeals also rejected petitioners' argument that they were denied due process by imposition of the conservatorship prior to a hearing. Pet. App. 8 n.3 (citing *Fahey* v. *Mallonee*, 332 U.S. 245 (1947)).

[3] There is no basis for petitioners' contention (Pet. 36) that the NCUA must issue a cease-and-desist order before it can issue a conservatorship order. The statute, which grants the NCUA broad powers to "immediately take possession and control" of failing credit unions to conserve assets and protect the insurance fund, 12 U.S.C. 1786(h)(1), imposes no such requirement. Moreover, petitioners are incorrect in asserting (Pet. 39-40) that 12 U.S.C. 1786(f)(1) requires a hearing even after the NCUA withdraws a cease-and-desist order. The statute provides that a temporary cease-and-desist order shall remain in

2. The courts below correctly rejected petitioners' challenge to the order of conservatorship. The NCUA is authorized to place a federally-insured credit union into conservatorship if it determines that such action is necessary to conserve the credit union's assets or to protect the credit union's members or the insurance fund. 12 U.S.C. 1786(h)(1)(A). Such a determination by its nature calls for the exercise of a substantial measure of judgment and discretion. Where the agency entrusted by Congress with oversight of federally-insured credit unions must act promptly and decisively to preserve the condition of a financial institution, the agency's actions are entitled to substantial deference. See generally *United States* v. *Gaubert*, 111 S. Ct. 1267, 1277 (1991) (decision to appoint a conservator or receiver involves "a great 'element of judgment or choice'") (quoting *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988)); *American Bank N.A.* v. *Clarke*, 933 F.2d 899 (10th Cir. 1991) (decision to close a bank as insolvent is "highly discretionary").[4]

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effect, unless modified or set aside by a court, "pending the completion of the administrative proceedings pursuant to such notice [of charges] and until such time as the Administration shall dismiss the charges specified in such notice." Here, the NCUA terminated all administrative proceedings with respect to the cease-and-desist order and dismissed all charges with respect to that order.

[4] Petitioners are wrong in contending (Pet. 44-45) that the court of appeals should not have drawn an analogy between judicial review of NCUA conservatorship orders and judicial review of FHLBB (the former Federal Home Loan Bank Board) conservatorship orders. Congress viewed the NCUA's conservatorship authority as analogous to that of the FHLBB. See S. Rep. No. 536, 97th Cong., 2d Sess. 51 (1982) ("The proposed conservatorship authority [for the NCUA] is similar to that available to the Comptroller of the Currency and Federal Home Loan Bank Board."). Thus, although the FHLBB no longer exists, see *Gaubert*, 111 S. Ct. at 1271 n.1, the analogy remains valid.

In this case, the NCUA's order of conservatorship set forth in detail the factual and legal basis for its action. Contrary to petitioners' suggestion (Pet. 45), the NCUA did not issue the order of conservatorship based simply on a determination that the credit union was engaged in unsafe or unsound practices. Instead, consistent with Section 1786(h)(1)(A), the NCUA determined that conservatorship was necessary "to conserve the assets of the credit union and protect both the interest of the [insurance fund] and the members of the credit union." Pet. App. 43; see *id.* at 24-46. Following a lengthy evidentiary hearing, "the district court found that the credit union was losing money, had suffered operating losses, had operating problems, had serious problems with its contracting procedure, and a possible conflict of interest." Pet. App. 9. Petitioners do not dispute those findings.

In addition, the Binghams entered into a series of contracts with the credit union from which they stood to make substantial sums during a period in which the credit union was operating at a loss. This pattern of self-dealing is particularly troubling in light of the fact that the NCUA had notified the credit union in 1987 that it was not to enter into any contracts with the Binghams without the NCUA's approval, and that the NCUA would consider such contracts a basis for taking administrative action. See Pet. App. 38; see also *id.* at 15-17. These facts fully justified the NCUA's decision to issue a conservatorship order in this case.[5]

---

[5] We are informed by the NCUA that the credit union has been liquidated and its charter cancelled by Tennessee authorities.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ANTHONY J. STEINMEYER
THOMAS M. BONDY
Attorneys

AUGUST 1991

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Civil No. 89-3138-HB

J. GORDON BINGHAM, JR., ET AL.,
PLAINTIFFS,

VS.

NATIONAL CREDIT UNION ADMINISTRATION BOARD,
DEFENDANT.

ORDER OF DISMISSAL

Because of the filing of the Notice of Dismissal of Temporary Cease and Desist Order and Notice of Charges and Hearing by the National Credit Union Administration Board and based upon statements of counsel for the parties that said dismissal renders the issues in this suit moot, it is therefore

ORDERED that this case is hereby dismissed.

Signed this 31 day of January, 1990.

/s/ Odell Horton
ODELL HORTON
United States District Judge

Approved:

_____

ALBERT H. BOYD
Attorney for Plaintiffs

W. HICHMAN EWING, JR.
United States Attorney

By: /s/ Joe A. Dycus
JOE A. DYCUS
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Civil No. 89-3137-HB

FIRST CENTRAL CREDIT UNION,
MEMPHIS, TENNESSEE,
J. GORDON BINGHAM, JR., ET AL.,
PLAINTIFFS,

VS.

NATIONAL CREDIT UNION ADMINISTRATION BOARD,
DEFENDANT.

ORDER GRANTING ORAL MOTION
TO AMEND COMPLAINT
AND ORDER DISMISSING COMPLAINT

Upon the oral motion of plaintiffs, made during the hearing of this cause, to amend the complaint to add as a plaintiff First Central Credit Union, Memphis, Tennessee, it is hereby

ORDERED that the motion is granted and First Central Credit Union, Memphis, Tennessee is added as a plaintiff to this complaint.

This action came on for a hearing before the court on the plaintiffs' motion for an Order to Show Cause why the defendant, National Credit Union Administration Board, should not be enjoined from continuing its possession and control of all books, records, assets and business of plaintiff, First Central Credit Union, Memphis, Tennessee, pursuant to 12 U.S.C. §1786(h)(3). For the reasons stated below and the reasons set forth by the court in its oral findings of fact and conclusions of law, which were stated at the conclusion of the hearing in this matter, and which oral

findings and conclusions are incorporated herein by reference, the Order to Show Cause is set aside, the injunction is denied and this cause of action is dismissed.

Under section 206(h)(1) of the Federal Credit Union Act, Congress has given the National Credit Union Administration Board broad power to appoint the Administration as conservator of any insured credit union. The standard enunciated in the Act is that the Board determine that such "action is necessary to conserve the assets of any insured credit union or to protect the Fund or the interests of the members of such insured credit union . . ." 12 U.S.C. §1786(h)(1)(A).

The court's standard of review under the Act is restricted to making sure that the Administration's action is not arbitrary and capricious. The court starts out with the presumption that the Administration properly exercised its powers. The administrative record and the testimony and exhibits introduced at the hearing of this matter demonstrate that the Administration had a reasonable basis for its determination that a conservatorship was necessary under the standards of 12 U.S.C. §1786(h)(1)(A). Further, the proof and exhibits put forth by the plaintiffs failed to demonstrate that the actions of the Administration were arbitrary and capricious.

The standards for a preliminary injunction in this circuit require the court to weigh equitably: whether the plaintiffs have shown irreparable injury; whether the plaintiffs have shown a likelihood of success on the merits of their claim; whether the relief would substantially harm other parties interested in the proceedings; and whether the public interest would be served by the relief sought. For the reasons stated by the court at the conclusion of the hearing in this matter, the court is not satisfied that the possible harm to plaintiffs is outweighed by the public interest in the Administration's protecting the assets of

the credit union, the interests of the members of the credit union and the insurance fund. Furthermore, plaintiffs have failed to demonstrate a likelihood of success on the merits in this cause. Therefore, it is hereby

ORDERED that the court's Order to Show Cause is set aside, that plaintiffs' motion for a preliminary injunction is denied, and that this cause of action is dismissed.

Signed this 31 day of January, 1990.

/s/ Odell Horton
ODELL HORTON
United States District Judge

Approved:

ALBERT H. BOYD
Attorney for Plaintiffs

W. HICHMAN EWING, JR.
United States Attorney

By: /s/ Joe A. Dycus
JOE A. DYCUS
Assistant United States Attorney

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